

A critical evaluation of the dispute resolution function of the Commission for Conciliation, Mediation and Arbitration (CCMA)

Blazius Oscar Kasungula Kwakwala



Thesis presented in partial fulfilment of the requirements for the degree of Master
of Commerce at the University of Stellenbosch

Supervisor
Mr G. Cillié

March 2010

DECLARATION

By submitting this thesis electronically, I declare that the entirety of the work contained herein is my own, original work, that I am the owner of the copyright thereof (unless to the extent explicitly otherwise stated) and that I have not previously in its entirety or in part submitted it for obtaining any qualification.

Signed : BOK Kwakwala

Date : 25 November 2009

ABSTRACT

One of the transformations that occurred in post-apartheid South Africa was the overhaul of labour legislation. The Labour Relations Act, 1995, the most pivotal product of the exercise, enacted the Commission for Conciliation, Mediation and Arbitration (CCMA) as a statutory labour dispute resolution institution. Given the failures of the previous dispute resolution system, the creators of the CCMA meant it to provide efficient, accessible and quality dispute resolution structured around conciliation and arbitration. The CCMA came into being in November 1996. The question that arises is: is the CCMA delivering efficient, accessible and quality dispute resolution? This research attempts to answer this question.

The literature review indicates that, in terms of efficiency, the CCMA underperformed in the early years, from its inception to the year ended 2004. Improvements started trickling in after 2004. The literature review portrays a positive picture of accessibility: that the CCMA is accessible to its users. As for the quality of dispute resolution, the literature review paints a negative picture: that the CCMA does not provide a quality dispute resolution service.

The researcher collected secondary data from the CCMA and primary data from parties to dispute resolution at the Cape Town Office of the CCMA, using a self-developed questionnaire. The data was analysed using Statistica version 9. The results show that the CCMA continues to grow and build on its previous efficiency successes: the CCMA concludes conciliations and arbitrations within the statutory time limits of 30 days and 60 days respectively. The results also show that the CCMA is accessible: the respondents found the process of referral and the actual processes of conciliation and arbitration informal. The results also show that the CCMA provides quality dispute resolution. All the respondents ranked the quality of conciliations and arbitrations positively.

The results for efficiency and accessibility support the literature review. The results for quality of dispute resolution contradict the literature review. Based on these findings, insightful conclusions are drawn and recommendations are made, to both the CCMA and for future research.

OPSOMMING

Die hersiening van arbeidswetgewing was een van die transformasies wat plaasgevind het in post-apartheid Suid-Afrika. Die mees uitstaande produk van hierdie oefening, naamlik die nuwe Wet op Arbeidsverhoudinge, 1995, het die Kommissie vir Versoening, Bemiddeling en Arbitrasie (KVBA) daargestel as 'n instelling vir statutêre geskilbeslegting. Gesien teen die agtergrond van die mislukkings van die vorige geskilbeslegtingstelsel het die skeppers van die KVBA probeer om effektiewe, toeganklike en kwaliteit geskilbeslegting met betrekking tot versoenings en arbitrasies te skep. Die KVBA het in November 1996 tot stand gekom en funksioneer vir die afgelope 13 jaar.

Die literatuurstudie toon aan dat, in terme van effektiwiteit, die KVBA onderpresteer het vanaf sy ontstaan tot en met 2004. Ná 2004 het verbeteringe drupsgewys ingetree. Die literatuurstudie skets 'n negatiewe beeld met verwysing na die gehalte van geskilbeslegting: die KVBA verskaf nie 'n geskilbeslegting diens van gehalte nie.

Die navorsing het sekondêre data vanaf die KVBA en primêre data van die partye betrokke by geskilbeslegting in die Kaapstad-kantoor van die KVBA ingesamel deur van 'n selfontwikkelde vraelys gebruik te maak. Die resultate toon dat die KVBA voortgaan om te groei en te bou op vorige suksesse ten opsigte van effektiwiteit: die KVBA handel versoenings en arbitrasies binne die statutêre tydsbepalings van 30 en 60 dae onderskeidelik af. Die resultate toon ook dat die KVBA toeganklik is: die respondente het die proses van arbitrasie as informeel ervaar. Die resultate toon ook dat die KVBA 'n kwaliteit geskilbeslegtingsfunksie verskaf. Alle respondente het die gehalte van versoenings positief beoordeel.

Die resultate ten opsigte van effektiwiteit en toeganklikheid ondersteun die literatuurstudie. Die resultate ten opsigte van die gehalte van die geskilbeslegtingsfunksie is strydig met die literatuurstudie. Voortvloeiend uit hierdie bevindinge, word tot insiggewende gevolgtrekkings gekom en aanbevelings word gemaak vir gebruik deur die KVBA, asook vir toekomstige navorsing.

ACKNOWLEDGEMENTS

First and foremost, I praise God for all the blessings that He bestows upon me.

My special thanks to Mr Gawie Cillié, my supervisor, for his professional guidance throughout the study. If it were not for him stimulating me intellectually beyond the limits, the output would have been poor. I am also forever indebted to Mr Gugulethu Zilwa of the CCMA, Cape Town, for welcoming me into their premises and providing the needed assistance. Without his assistance, it would have been impossible to complete the research.

I thank Prof. Malan and Prof. Theron of the Department of Industrial Psychology, for their involvement in my progress and for facilitating financial support for my studies. Without their support I would not have made it this far.

I also thank Prof. Nel of the Centre for Statistical Consultation, for the invaluable assistance during the design of the questionnaire, as well as during data analysis.

Lastly, I thank my family for their love and support. I must particularly mention Fr. Dr. Alfred Nsope, my “guardian angel”, for his love, support, inspiration and the many sacrifices he makes for my sake; my mother, Mayi Monica Khuse, for her everlasting love, care and support throughout all these years; my wife, Deliwe, for her love, understanding, support and encouragement; my parents-in-law, Mr and Mrs Nkhoma, and my great friends Obrien Mandala, Bright Mahembe and Suzanne de Stadler, all of whom stood foursquare by my side during my studies. Thanks very much for being there for me through thick and thin. Mwakoma nonse (God bless).

TABLE OF CONTENTS

DECLARATION	i
ABSTRACT	ii
OPSOMMING	iii
ACKNOWLEDGEMENTS	iv
LIST OF TABLES	x
LIST OF FIGURES	xii
CHAPTER 1: BACKGROUND, RESEARCH-INITIATING QUESTION, RESEARCH OBJECTIVE AND OVERVIEW OF THE STUDY	1
1.1 Background	1
1.2 Research-initiating question	5
1.3 Research objective	5
1.4 Study outline	6
CHAPTER 2: DISPUTE RESOLUTION UNDER THE LABOUR RELATIONS ACTS, 1956 AND 1995	7
2.1 Introduction	7
2.2 Statutory dispute resolution before 1995	7
2.2.1 Industrial councils	8
2.2.2 Conciliation boards	9
2.2.3 Industrial Court and the Labour Appeal Court	10
2.3 Evaluation of dispute resolution institutions before 1995	11
2.4 Statutory dispute resolution institutions since 1995	14
2.4.1 The Commission for Conciliation, Mediation and Arbitration (CCMA)	14
2.4.2 Other statutory dispute resolution institutions	16

2.4.2.1	Bargaining councils	16
2.4.2.2	Private dispute resolution agencies	18
2.5	Dispute resolution under the auspices of the CCMA	19
2.5.1	Resolution of disputes through consensus-based processes	21
2.5.1.1	Conciliation	21
2.5.1.2	Mediation	23
2.5.1.3	Non-binding fact finding	23
2.5.1.4	Advisory arbitration	24
2.5.1.5	Facilitation	24
2.5.2	Resolution of disputes through arbitration	25
2.5.2.1	General provisions for arbitration proceedings	25
2.5.2.2	Effect of arbitration awards	28
2.5.3	Mixed dispute resolution processes: con-arb	30
2.5.4	Powers of commissioners when attempting to resolve disputes	30
2.5.5	Representation and assistance in CCMA proceedings	31
2.5.6	Jurisdictional issues	32
2.5.6.1	Existence of a dispute	32
2.5.6.2	Parties to disputes	32
2.5.6.3	Time lines for referral of cases to the CCMA	35
2.5.6.4	Jurisdictional disputes	36
2.6	Summary	39
CHAPTER 3: EVALUATING A DISPUTE RESOLUTION SYSTEM		41
3.1	Introduction	41
3.2	Theoretical framework for evaluating a dispute resolution system	41

3.2.1	Efficiency	42
3.2.2	Accessibility	46
3.2.3	Quality of dispute resolution	48
3.3	Summary	52
CHAPTER 4: RESEARCH METHODOLOGY		54
4.1	Introduction	54
4.2	Research design	54
4.3	Sampling	55
4.4	Measuring instrument	56
4.4.1	General/demographic details	56
4.4.2	Efficiency	57
4.4.3	Accessibility	57
4.4.4	Quality of dispute resolution	58
4.5	Reliability and validity	59
4.6	Data analysis	62
4.7	Informed consent	63
4.8	Summary	64
CHAPTER 5: PRESENTATION OF RESEARCH RESULTS		65
5.1	Introduction	65
5.2	General/demographic information	65
5.2.1	Identity of parties	65
5.2.2	Employee parties' position, earnings and qualifications	66
5.2.3	Referrals by process	68
5.2.4	Referrals by dispute	69

5.2.5	Referrals by sector	69
5.2.6	First or nth time at the CCMA	70
5.2.7	Size of employer	72
5.2.8	Representation at hearings	73
5.2.9	Conclusion	74
5.3	Efficiency	75
5.4	Accessibility	76
5.4.1	Informality of the actual referral process	76
5.4.2	Informality of the process of dispute resolution	79
5.4.2.1	Conciliations	80
5.4.2.2	Arbitrations	84
5.5	Quality of dispute resolution	87
5.5.1	Conciliations	88
5.5.2	Arbitrations	92
5.6	Summary	96
CHAPTER 6: DISCUSSION OF RESEARCH RESULTS		97
6.1	Introduction	97
6.2	Efficiency	97
6.3	Accessibility	98
6.4	Quality of dispute resolution	101
6.5	Summary	104
CHAPTER 7: RECOMMENDATIONS AND CONCLUSIONS		105
7.1	Introduction	105
7.2	Challenges and recommendations	105

7.2.1	Efficiency	105
7.2.2	Accessibility	106
7.2.3	Quality of dispute resolution	107
7.3	Limitations of the research and recommendations for future research	108
7.4	Conclusion	110
REFERENCES		111
APPENDIX A: QUESTIONNAIRE		116

LIST OF TABLES

Table 4.1	Reliability/item analysis for informality of the referral process	60
Table 4.2	Reliability/item analysis for quality of conciliations	60
Table 4.3	Reliability/item analysis for informality of conciliations	61
Table 4.4	Reliability/item analysis for informality of arbitrations	61
Table 4.5	Reliability/item analysis for quality of arbitrations	62
Table 5.1	Informality of process of referral: means per item	77
Table 5.2	Informality of process of referral: low- and high-education parties	77
Table 5.3	Informality of process of referral: first timers and nth timers	79
Table 5.4	Informality of conciliations: means per item	80
Table 5.4a	Informality of conciliations: employer and employee parties	80
Table 5.5	Informality of conciliations: low- and high-education parties	82
Table 5.6	Informality of conciliations: first and nth timers	83
Table 5.7	Informality of arbitrations: means per item	84
Table 5.7a	Informality of arbitrations as between employers and employees	84
Table 5.8	Informality of arbitrations: low- and high-education parties	86
Table 5.9	Informality of arbitrations: first and nth timers	87
Table 5.10	Quality of conciliations: means per item	88
Table 5.10a	Quality of conciliations: employers and employees	89
Table 5.11	Quality of conciliations: low- and high-education parties	90
Table 5.12	Quality of conciliations: first timers and nth timers	91
Table 5.12a	Quality of arbitrations: means per item	92
Table 5.12b	Quality of arbitrations: employers and employees	92

Table 5.13	Quality of arbitrations: low- and high-education parties	94
Table 5.14	Quality of arbitrations: first timers and nth timers	95

LIST OF FIGURES

Figure 2.1	Industrial councils: disputes handled and settled from 1990 to 1994	11
Figure 2.2	Conciliation board applications and settlement from 1990 to 1994	12
Figure 2.3	Industrial Court activities: November 1993 to October 1994 (in percentages)	12
Figure 2.4	Schematic representation of the process of dispute resolution at the CCMA	20
Figure 3.1	CCMA national caseload from 1996 to 2008	43
Figure 3.2	CCMA national referrals by dispute from 2004 to 2008	43
Figure 3.3	CCMA national referrals by sector from 2004 to 2008	44
Figure 3.4	Turnaround times and settlement rates of the CCMA from 2004 to 2008	45
Figure 5.1	Identity of party completing the questionnaire	66
Figure 5.1a	Employee/trade union parties' position in the workplace	67
Figure 5.1b	Qualifications	67
Figure 5.1c	Wages per month	68
Figure 5.1d	Referrals by process	68
Figure 5.1e	Referrals by dispute	69
Figure 5.1f	Referrals by sector	70
Figure 5.1g	First or nth time at the CCMA (Conciliations)	71
Figure 5.1h	First or nth time at the CCMA (Arbitrations)	72
Figure 5.1i	Size of employer	73
Figure 5.1j	Type of representation used	74
Figure 5.2	Informality of process of referral: low- and high-education parties	78
Figure 5.3	Informality of process of referral: first timers and nth timers	79
Figure 5.4	Informality of conciliations: employer and employee parties	81

Figure 5.5	Informality of conciliations: low- and high-education parties	82
Figure 5.6	Informality of conciliations: first and nth timers	83
Figure 5.7	Informality of arbitrations: employers and employees	85
Figure 5.8	Informality of arbitrations: low- and high-education parties	86
Figure 5.9	Informality of arbitrations: first and nth timers	87
Figure 5.10	Quality of conciliations: employers and employees	89
Figure 5.11	Quality of conciliations: low- and high-education parties	90
Figure 5.12	Quality of conciliations: first timers and nth timers	91
Figure 5.12a	Quality of arbitrations: employers and employees	93
Figure 5.13	Quality of arbitrations: low- and high-education parties	94
Figure 5.14	Quality of arbitrations: first timers and nth timers	95
Figure 6.1	Efficiency statistics of the CCMA from 2004/2005 to 2008/2009	98
Figure 6.2	CCMA national caseload from 1996 to 2008/2009	98

CHAPTER 1: BACKGROUND, RESEARCH-INITIATING QUESTION, RESEARCH OBJECTIVE AND OVERVIEW OF THE STUDY

1.1 Background

Interests, rights and power are three basic elements of disputes (Ury, Brett & Goldberg, 1988). In a dispute the parties have certain interests at stake, certain relevant standards or rights exist as guideposts toward a fair outcome, and there is a certain balance of power between the parties. Accordingly, in resolving disputes, parties may choose to focus attention on one or more of these basic factors. They may seek to reconcile their underlying interests, determine who is right or wrong or determine who is more powerful than the other (Ury *et al.*, 1988).

Reconciling interests involves probing for deep-seated concerns, devising creative solutions and making tradeoffs and concessions where interests are opposed (Lewicki, Barry & Saunders, 2007). The most common procedure for this is negotiation. To reach agreement on rights, where the outcome will determine who gets what, frequently requires parties to turn to a neutral third party who has the power to hand down a binding decision (Lewicki *et al.*, 2007). The typical procedure is adjudication. The third way to resolve a dispute is on the basis of power, which, narrowly defined, is the ability to coerce someone to do something they would not otherwise do. The exercise of power takes two common forms: acts of aggression or violence, and acts of withholding the benefits that accrue from a relationship, as when employees withhold their labour in a strike. Exercising power typically involves imposing costs on the other side or threatening to do so. For example, in striking, employees impose economic costs on the employer (Lewicki *et al.*, 2007).

In general, focusing on interests tends to produce higher satisfaction with outcomes, better working relationships, less recurrence of disputes and lower transaction costs, as opposed to determining who is right or wrong, which in turn is more effective than determining who is more powerful (Ury *et al.*, 1988). A focus on interests resolves the problem underlying the dispute more effectively and thus tends to generate a higher level of mutual satisfaction with outcomes than a focus on rights or power. If the parties are more satisfied, their relationship benefits and it

becomes unlikely for the dispute to recur. Determining who is right or wrong, as in litigation, or who is more powerful, as in a strike, usually leaves at least one party perceiving itself as the loser and thus typically makes the relationship more adversarial and strained (Ury *et al.*, 1988).

Although determining who is right or wrong or who is more powerful can strain the relationship, deferring to a fair standard takes less of a toll than violence. Rights contests differ from power contests chiefly in their transaction costs (Ury *et al.*, 1988). A power contest typically costs more in resources consumed and opportunities lost. Strikes cost more than arbitration. Violence costs more than litigation. The high transaction costs stem not only from the efforts invested in the fight, but also from the destruction of each other's resources. Destroying the opposition is actually the very object of a power contest. Power contests, then, typically damage the relationship more and lead to a greater recurrence of disputes than do rights contests. In general, a rights approach is less costly than a power approach (Ury *et al.*, 1988).

Although that is the case, not all disputes can or should be resolved by reconciling interests. Rights and power procedures can sometimes accomplish what interests-based procedures can not (Ury *et al.*, 1988). Problems emerge where rights and power procedures (that should be the last resort) needlessly become the first resort: where an interests-oriented dispute resolution approach, in which most disputes are resolved through reconciling interests, some through determining who is right or wrong and the fewest through determining who is more powerful, gives way to a power-oriented dispute resolution approach, in which comparatively few disputes are resolved through reconciling interests, while many are resolved through determining rights and power (Ury *et al.*, 1988).

The inclination of parties to adopt either interests- or a power-oriented dispute resolution approach depends to a great extent on the existence and performance of statutory dispute resolution institutions in a country. Where the state pursues a non-interventionist ideology, predicated on minimal or no interference in the conduct of the labour relationship, among other aspects, labour dispute resolution rests with the parties. If negotiations fail, parties are at liberty to proceed by way of either adjudication or industrial action.

Adjudication generally refers to processes of decision making that involve a neutral third party with the authority to determine a binding resolution through some form of judgment or award. Specifically, adjudication refers to litigation or court-based resolution of conflicts (Yarn, 1999).

Adjudication is an adversarial process that in many cases degenerates into a battlefield, where questions of expense, delay, compromise and fairness have low priority (Roberts & Palmer, 2005). In civil cases, one side that believes he or she has been wronged (the plaintiff) sues or files legal charges against the side or institution they have a legal problem with (the defendant). Once this occurs, both parties are obligated by law to participate in court-based proceedings. If the case goes to trial, each side then presents reasoned arguments and evidence to support their claims: to prove themselves right and the other side wrong, resulting in win-lose outcomes (Yarn, 1999). Once that presentation of evidence and arguments is completed, a judge or jury makes a decision. Appeals may be filed in an attempt to get a higher court to reverse the decision. If no appeal is filed, the decision is binding on both parties (Yarn, 1999).

Lamentably, adjudication is not an effective dispute resolution process. Control of the process is removed from the client/disputant and delegated to the lawyer and the court (Dauber, 1994). The process is prohibitively expensive in terms of money, making it impossible for some parties to take their complaints to a court of law. The costs include legal fees (which, on average, constitute 98% of litigation expenses), given that legal representation is compulsory in litigation, and orders of costs, which courts inflict on unsuccessful parties in favour of successful parties (Meyer, 1997). Parties to litigation also experience indirect costs beyond the legal fees. For example, disruption to the functioning of one's business or progression of one's career can be just as damaging (Goldberg, Rogers & Cole, 2007). Such costs act as a deterrent to aggrieved parties to seek redress in courts of law. Courts are also inefficient: it takes years to get a dispute resolved, by which time the value of the damages or compensation receivable falls to zero in real terms (Hay, Shleifer & Vishny, 1996). Backlogged with cases four and six years old, judges also fail to attend to the finer issues involved in the litigation. As such, the unresolved issues continue to haunt the disputants. Related to this is the fact that courts are constrained by the law as to what solutions they can offer. When the underlying issues are not addressed, the decision may produce a short-term settlement, not a long-term resolution (Dauer, 1994). Dauer (1994) also argues that

courts act mostly as courts of law and not of equity. Litigation requires that people's problems be translated into legal issues, yet the court's decision about those issues does not always respond to the real nature of the underlying problem. For example, issues might be framed in terms of money, where the real issue is one of trust and respect: emotional issues not dealt with in an adversarial process. Adjudication also rests on a win-lose stance which precludes the parties from considering collaborative, integrative and mutually acceptable solutions (Goldberg *et al.*, 2007). This adversarial, positional nature is often accompanied by emotional distress and it drives parties apart while effective resolution often requires that they come closer together. Another demerit of adjudication is that the decision makers (the judges) are generalists who lack expertise in the area of the dispute, resulting in wrong decisions and subsequent appeals to higher forums (Goldberg *et al.*, 2007). Finally, the ability of parties to appeal to a higher court after losing at the trial court level, and the paper war between lawyers relating to motions on an infinite variety of topics, rob adjudication of finality: the dispute becomes almost endless (Goldberg *et al.*, 2007).

For all these reasons, in a non-interventionist industrial relations system, employees and employers (with their inevitable need for urgency) almost always lean towards industrial action in the event of the failure of or even as an alternative to negotiations. Finnemore and Van Rensburg (2002) elaborate that the motivation in such cases is the desire for a rapid response (industrial action) to extract rapid redress from the other party. The issues in dispute are recognised as being so 'perishable' that delaying action might imply acceptance of the situation and forestall redress. Thus, because the other party is usually caught unawares and commitment to the issue is high, the industrial action effectively obliges both parties to resolve the dispute (Finnemore & Van Rensburg, 2002).

In an interventionist industrial relations system, the state establishes statutory dispute resolution institutions as a first port of call in labour disputes before recourse to either adjudication or industrial action. Where statutory dispute resolution institutions exist, the efficiency, accessibility and quality of dispute resolution of the institutions become critical success factors of statutory dispute resolution (Hay *et al.*, 1996). The rationale is that (with their inevitable need for urgency) the disputing parties must be able to refer disputes to the dispute resolution institution at any time, and that the institution must be able to render rapid response (Brand, Lotter, Steadman &

Ngcukaitobi, 2008). The institutions must be able to provide quality or professional dispute resolution (that is process and specific subject matter expertise). They must also be affordable. Unless a cheap, quick, simple dispute resolution process is available, employees and employers (with their inevitable need for urgency) will always resort to industrial action to resolve their disputes. Stated alternatively, the longer disputes fester between parties, the slimmer the chances that a resolution to the dispute can be found and as the conflict inevitably escalates, the application of economic power becomes the only solution, according to the disputing parties (Brand *et al.*, 2008).

In line with its interventionist ideology of societal corporatism, South Africa, *inter alia*, established the Commission for Conciliation, Mediation and Arbitration (CCMA) as a statutory dispute resolution institution and first institution of engagement in labour disputes (alongside bargaining councils, where they exist, and private dispute resolution agencies, where agreed upon). Through the CCMA, South Africa seeks to promote effective labour dispute resolution by prescribing conciliation, mediation and arbitration as primary dispute resolution processes and allowing industrial action only after the exhaustion of these primary dispute resolution processes. The creators of the CCMA envisaged an institution that could provide quick, accessible, non-technical, cheap but professional dispute resolution.

1.2 Research-initiating question

The CCMA became operational in November 1996. Looking back over these 13 years of labour dispute resolution by the CCMA, the question that arises is: is the CCMA fulfilling its mandate? In particular, does the CCMA deliver an expedited, efficient, accessible (informal and inexpensive) and professional/quality dispute resolution service, as envisaged by the framers of the CCMA?

1.3 Research objective

The main objective of this research is to critically evaluate the dispute resolution function of the CCMA. The specific objective was to investigate whether the CCMA delivers an expedited, efficient, accessible (informal and inexpensive) and professional, quality dispute resolution service.

1.4 Study outline

The present chapter outlined the background, the research-initiating question and the main objective of the research. Chapter 2 highlights the legal framework of dispute resolution in South Africa. In particular, the chapter trains the spotlight on the CCMA. Chapter 3 provides a theoretical background in respect of the evaluation of a statutory dispute resolution institution. The chapter also discusses the key performance indicators of the CCMA and provides an indication of the performance of the CCMA prior to the study. Chapter 4 discusses the research methodology. The research results obtained during the data collection are reported in Chapter 5 and discussed in Chapter 6. Chapter 7 discusses limitations of the study, makes recommendations both to the CCMA and for future research, and draws the conclusion of the study.

The next chapter, Chapter 2, discusses the legislation that regulated dispute resolution in South Africa before 1995, the legislation that currently regulates dispute resolution (since 1995), and the CCMA.

CHAPTER 2: DISPUTE RESOLUTION UNDER THE LABOUR RELATIONS ACTS, 1956 AND 1995

2.1 Introduction

Knowledge about the history of any phenomenon contributes to a greater understanding of the present by placing the phenomenon in context and showing how it has evolved. This applies to labour relations in general and to labour dispute resolution in particular in South Africa. Dispute resolution in South Africa has always been regulated by Labour Relations Acts (both before and after the democratisation of the country in 1994). The Labour Relations Act, 1956 (Republic of South Africa, 1956) regulated dispute resolution in the period before 1995. The Labour Relations Act, 66 of 1995 (Republic of South Africa, 1995b) is the legislation that has regulated dispute resolution in the country since 1995. This chapter presents an overview of both pieces of legislation, with specific reference to their dispute resolution provisions.

2.2 Statutory dispute resolution before 1995

The first labour legislation in South Africa to comprehensively establish mechanisms for dispute resolution was the Industrial Conciliation Act of 1924, which was in later years amended and called the Labour Relations Act, 1956. The preamble to the Labour Relations Act, 1956 included as one of the aims of the Act the prevention and settlement of disputes between employees and employers (Rycroft & Jordaan, 1992). In fulfilment of this aim, the Act established various structures and mechanisms to channel and institutionalise conflict. These were: industrial councils, conciliation boards, the Industrial Court and the Labour Appeal Court. A consequence of the use of these mechanisms in an attempt to resolve disputes was that the Act's requirements of lawful action were satisfied, opening up to the parties the possibility of lawful industrial action as the ultimate method of dispute resolution (Rycroft & Jordaan, 1992).

These dispute resolution institutions (industrial councils, conciliation boards, the Industrial Court and the Labour Appeal Court) will be discussed in the following sections.

2.2.1 Industrial councils

Under the Labour Relations Act, 1956, an industrial council was a body formed by the Department of Labour when sufficient employers or employers' organisations and employees or trade unions in a particular industry agreed to negotiate at industry level on employment conditions or matters of mutual interest, and to attempt to resolve disputes (Cameron, Cheadle & Thompson, 1989). Dispute resolution took place chiefly through conciliation, or any dispute resolution procedures that the council incorporated into its constitution (Rycroft & Jordaan, 1992). The council was a voluntary forum registered in respect of a particular industry (regional or national), which automatically became its jurisdictional area (Cameron *et al.*, 1989). The jurisdiction extended to employers and employees who fell within the industry, regardless of whether or not they were members of the industrial council. Either a trade union or employer's organisation could refer a dispute to the industrial council. Individuals could be assisted in the referring and settling of the dispute by a trade union or employer's organisation, as the case may be (King, 1996).

An industrial council was obliged to attempt to resolve disputes referred to it, provided it had jurisdiction over the dispute and had not already endeavoured to settle the dispute; the reference was in writing and signed by an office bearer of the referring party; there was an additional certificate in the case of an unregistered trade union or employers' organisation; the referral was accompanied by a certificate stating that, in taking the steps which led to the dispute and in making the referral, there had been compliance with the constitution of the union or employers' organisation; if the dispute related to an unfair labour practice, the referral was made within 180 days from the date on which the unfair labour practice commenced or ceased, as the case may be, or such later date as agreed upon by the parties or, in the event of no such agreement, the Director-General on good cause shown for the late application, fixed a date; and finally, provided there was no existing wage-regulating measure binding on the parties that covered the subject matter of the dispute and that had been in operation for less than 12 months (Rycroft & Jordaan, 1992).

The industrial council had to endeavour to settle the dispute within 30 days (or in such further period decided by the industrial council) and report to the Director-General within 14 days on

whether or not it had succeeded in settling the dispute (Cameron *et al.*, 1989). Where the dispute remained unresolved and concerned an unfair labour practice, any party to the dispute could within 90 days refer the dispute to the Industrial Court for determination. The Industrial Court could condone a late application if good cause was shown (King, 1996).

2.2.2 Conciliation boards

Where there was no industrial council having jurisdiction over a matter in dispute, a party could apply to the Department of Labour for the establishment of a conciliation board to attempt to resolve the dispute (Cameron *et al.*, 1989). Such conciliation boards comprised an equal number of employer and employee representatives, who established their own procedures and self-regulated the dispute resolution process. Procedural requirements similar to those stipulated for an industrial council applied to a conciliation board. The Department of Labour was obliged to establish a conciliation board as soon as practicable after the date on which the application was lodged and, after consultation with the parties, determine the terms of reference and the area to which any agreement may apply (Rycroft & Jordaan, 1992).

A conciliation board could not be established unless, in the case of a dispute concerning an unfair labour practice, the application was lodged within 180 days from the date on which the unfair labour practice had commenced or ceased, as the case may be, or such later date agreed upon by the parties or, in the event of no such agreement, the Director-General on good cause shown for the late application, fixed a date; if there was an industrial council having jurisdiction in respect of the matter in dispute; and if there was an existing wage-regulating measure binding on the parties that covered the subject matter of the dispute and that had been in operation for less than 12 months (Rycroft & Jordaan, 1992).

The conciliation board had to attempt to settle the dispute within 30 days from the date on which the application was lodged. The parties to the dispute could extend this period by agreement (Cameron *et al.*, 1989). If the conciliation board reached a settlement agreement, that agreement was binding by the ordinary principles of the law of contract, but could assume the character of subordinate legislation if the Minister of Labour published and declared it binding. If the dispute remained unsettled at the end of the period, the parties were at liberty either to refer the dispute to

the Industrial Court if the dispute concerned unfair labour practices or to resort to industrial action in other cases (King, 1996).

The Act also provided for mediation and arbitration as mechanisms of dispute resolution. An industrial council, a conciliation board or any party to the dispute could request for a state mediator by applying to the Minister of Labour for the appointment of a mediator to assist in the resolution of a dispute (Cameron *et al.*, 1989). Alternatively, if persuaded that the appointment of a mediator would facilitate the settlement of a dispute by any industrial council or conciliation board, the Minister would appoint a mediator after consultation with the industrial council, conciliation board or with the parties to the dispute, as the case may be (Cameron *et al.*, 1989).

The Labour Relations Act, 1956 also made provision for voluntary arbitration by permitting an industrial council or conciliation board to decide, on the basis of majority vote, to refer a dispute to arbitration. Compulsory arbitration applied where an industrial council or a conciliation board failed to settle a dispute involving employers and employees in essential services (Cameron *et al.*, 1989).

2.2.3 Industrial Court and the Labour Appeal Court

The Industrial Court and the Labour Appeal Court existed mainly as adjudicators of disputes. The Industrial Court, with jurisdiction in all the provinces, was a quasi-judicial tribunal (Cameron *et al.*, 1989). Its functions were to grant interim relief, interdict or any other order, as the case may be; to decide an appeal against a decision of an industrial council; to consider and decide on any application made in terms of an order to reinstate an employee, to restore terms and conditions of employment or to abstain from an unfair labour practice; to determine disputes regarding an alleged unfair labour practice; to give direction for the operations of a trade union or employers' organisation; to conduct voluntary or compulsory arbitration; to advise the Minister of Labour on the extension of essential services; and to determine any question with regard to the demarcation between undertakings, industries, trades and occupations, as well as to determine the undertaking, industry, trade or occupation in which a labour broker is engaged (Du Plessis, 1994). The Industrial Court could, in the performance of its functions make orders as to costs (Rycroft & Jordaan, 1992).

The functions of the Labour Appeal Court were to decide any questions of law and to decide any appeals against the decision of the Industrial Court with regard to unfair labour practice, and to review proceedings of the Industrial Court (Du Plessis, 1994).

2.3 Evaluation of dispute resolution institutions before 1995

According to the Explanatory Memorandum to the Labour Relations Bill, 1995 (RSA, 1995a), which motivated the Labour Relations Act, 1995, the previous dispute resolution system simply did not work. It failed to provide fast and efficient dispute resolution and achieved very low settlement rates: on average 20% of conciliation board disputes and 30% of industrial council disputes. Figures 2.1, 2.2 and 2.3 below show the inefficiency of these dispute resolution institutions.

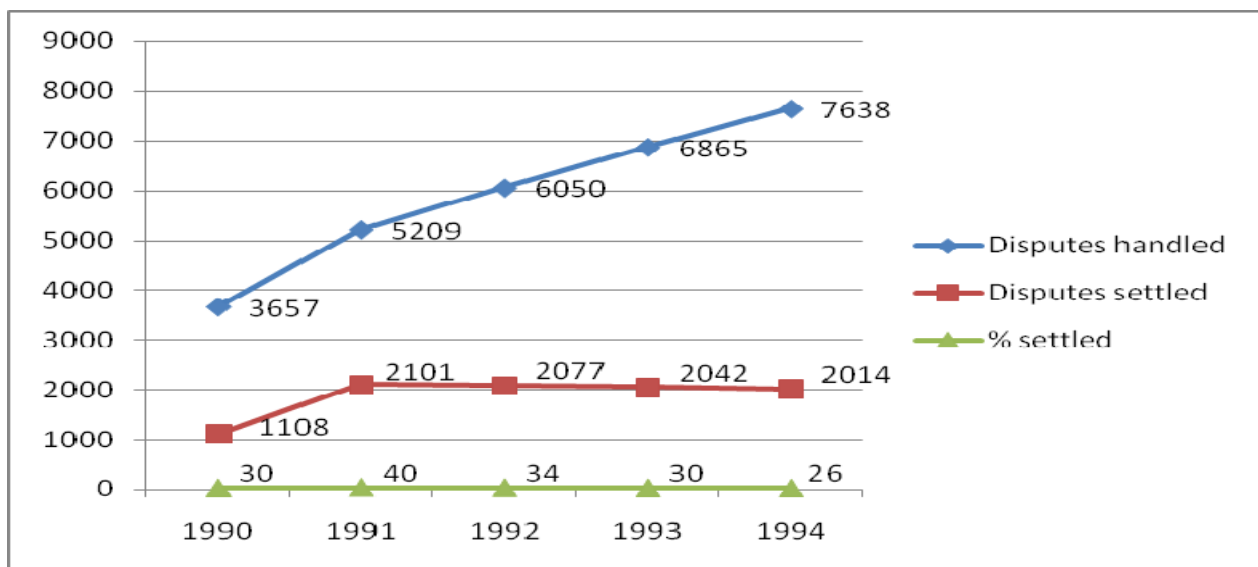


Figure 2.1 Industrial councils: disputes handled and settled from 1990 to 1994
(King, 1996, p. 80)

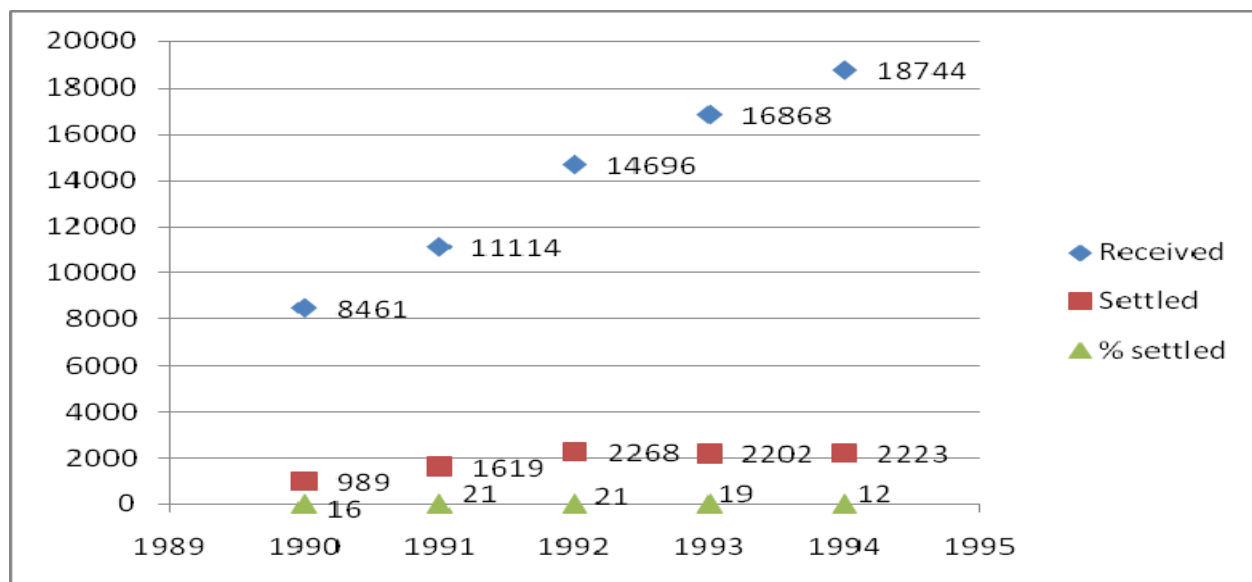


Figure 2.2 Conciliation board applications and settlement from 1990 to 1994
(King, 1996, p. 81)

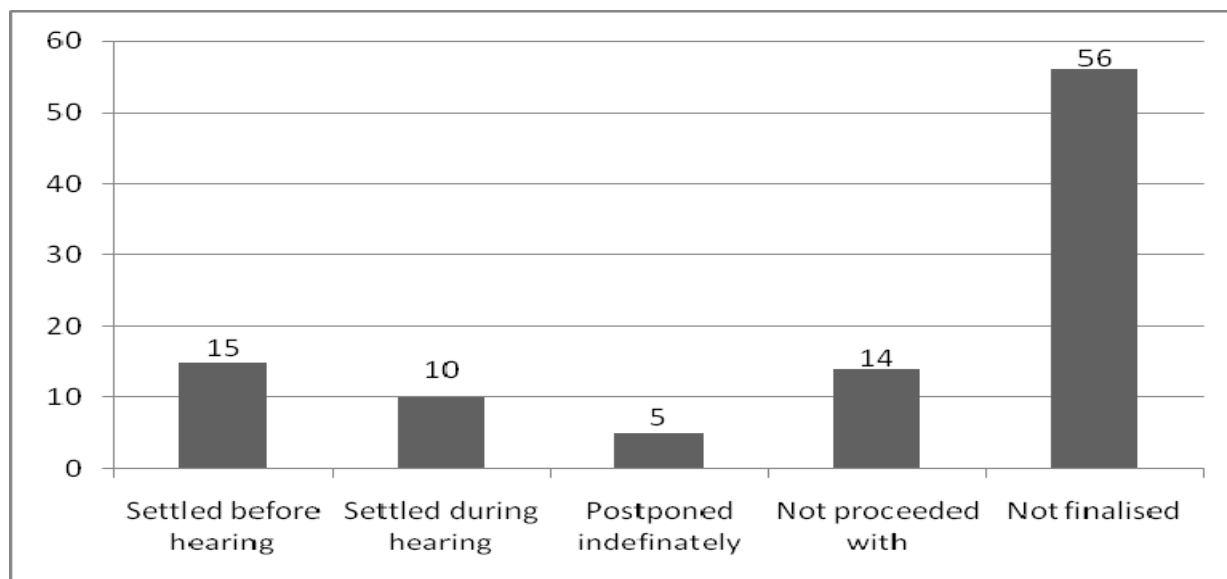


Figure 2.3 Industrial Court activities: November 1993 to October 1994 (in percentages)
(King, 1996, p. 81)

The Explanatory Memorandum to the Labour Relations Bill, 1995 (RSA, 1995a) added that the conciliation procedures were lengthy: dispute resolution was overburdened and characterised by long delays. Disputes often took long to be settled finally. The system was complex and pitted with technicalities. It was not user friendly. It relied heavily on formal and technical knowledge and compliance with procedures. Successful navigation through the procedures required legal expertise and familiarity with technical procedures, which were beyond the reach and comprehension of most individuals and small businesses. The merits of the dispute often got lost in procedural technicalities. Errors made in the initiation of conciliation procedures could fatally prejudice an applicant's claim for relief (RSA, 1995a).

The Explanatory Memorandum to the Labour Relations Bill, 1995 (RSA, 1995a) also bemoaned that the Industrial Court's system of adjudication of unfair dismissal disputes was too lengthy, legalistic and inaccessible (so legalistic that the outcome or the resolution of a dispute depended on the observance of certain formalities) as well as being prohibitively expensive (financially well out of reach of most dismissed employees, for example) (RSA, 1995a). Formal legal proceedings often took years from inception to ultimate resolution, and considerable delays arose in appealing a matter from the Industrial Court to the Labour Appeal Court. It could take up to three years before a case of unfair dismissal was finally determined by the Appellate Division (RSA, 1995a). Christie (1998) corroborates that, in this regard, the poorest people, namely agricultural workers and domestic servants, had no protection against employer power to hire and fire. As most employees could not afford legal services and because court procedures were complex, access was effectively denied those who were not unionised or could not afford legal assistance.

In short, the system was completely ineffectual: it lacked legitimacy, did not have the confidence of its users, and failed as a credible alternative to resolving labour disputes. As a consequence, to have their disputes resolved, parties involved in labour disputes (with their inevitable need for urgency) either turned to private dispute resolution agencies, which had much greater success rates than the statutory dispute resolution system, or simply engaged in many unnecessary strikes. This meant that many resolvable disputes culminated in industrial action: manifestation of an almost complete breakdown in the labour dispute resolution system (RSA, 1995a).

Against this background, the drafters of the new Labour Relations Act, 1995 envisaged efficient, accessible (simplified, non-legalistic, informal) and quality dispute resolution predicated on statutory conciliation, mediation and arbitration. The objective was to create a system that contrasted starkly with the preceding one (Basson, Christianson & Garbers, 2005).

2.4 Statutory dispute resolution institutions since 1995

The Labour Relations Act, 1995 (Republic of South Africa, 1995b) replaced the Labour Relations Act, 1956 and created a number of dispute resolution institutions, namely the CCMA, bargaining councils and private dispute resolution agencies as primary institutions of dispute resolution (Du Toit, 2006). These institutions will be discussed briefly in the sections that follow. The CCMA will be discussed firstly in more detail.

2.4.1 The Commission for Conciliation, Mediation and Arbitration (CCMA)

The CCMA is an independent statutory body with juristic personality. It has jurisdiction in all the provinces of the Republic of South Africa and maintains an office in each province, and as many local offices as it considers necessary (Du Toit, 2006). A dispute must be referred to the provincial office situated in the province in which it arose. Currently, the CCMA has 15 offices: a headquarters in Gauteng and one office each in Johannesburg and Pretoria; two offices in the Eastern Cape: one in East London and another in Port Elizabeth; one office in the Free State (Bloemfontein); three offices in KwaZulu-Natal: one each in Durban, Pietermaritzburg and Richards Bay; one office in Limpopo (Polokwane); one office in Mpumalanga; one office in the Northern Cape (Kimberley); two offices in the North West Province (Klerksdorp and Rustenburg); and two offices in the Western Cape (Cape Town and George) (CCMA, 2009). The CCMA receives its funding from government. Access to the CCMA is free (RSA, 1995b, Section 122).

The CCMA is governed by a governing body, which consists of an independent chairperson and nine representatives of organised labour, organised business and the State. Each representative is nominated by the National Economic Development and Labour Council (NEDLAC) and appointed by the Minister of Labour to hold office for a period of three years (RSA, 1995b, Section 116). The CCMA therefore is a tripartite body.

According to Sections 117 to 120 of the Labour Relations Act, 1995 (RSA, 1995b), the governing body appoints the Director of the CCMA, who manages and directs the activities of the CCMA, appoints and supervises the CCMA's staff and performs any other functions that are either conferred upon him/her by or in terms of the Labour Relations Act, 1995, or by any other law; or manages and directs functions that are delegated to him/her by the governing body. The governing body also appoints commissioners on either a full-time or a part-time basis and either as a commissioner or a senior commissioner, to perform the functions of the CCMA. The governing body also determines the remuneration, allowances and all terms and conditions of appointment of the CCMA director, commissioners and staff members. The governing body also establishes the conduct of the commissioners and may remove a commissioner from office for serious misconduct, incapacity, or a material violation of the code of conduct. Each commissioner is responsible to the director for the performance of the commissioner's functions. The Labour Relations Act, 1995 (Section 121) also empowers the governing body to establish committees to assist the CCMA.

The Labour Relations Act, 1995, Section 115(1) to (6), confers on the CCMA a number of functions (RSA, 1995b). The CCMA's main function is dispute resolution through conciliation and arbitration if a dispute remains unresolved after conciliation. The CCMA may, upon request, advise a party to a dispute about the procedure to follow for the resolution of a dispute, or assist a party to a dispute to obtain legal advice or representation. If the CCMA is aware of a dispute that has not been referred to it, and if resolution of the dispute would be in the public interest, the CCMA may offer to attempt to resolve the dispute through conciliation.

The CCMA may make rules regulating proceedings at its (or its committees') meetings; dispute resolution practices and procedures; the process by which conciliation and arbitration are initiated and their forms, content and use; the joinder of any person having an interest in the dispute in any conciliation and arbitration proceedings; the intervention of any person as an applicant or respondent in conciliation or arbitration proceedings; the amendment of any citation and the substitution of any party for another in conciliation or arbitration proceedings; the hours during which its offices will be open for operations; any period that is not to be counted for the purpose of calculating time periods; the forms to be used by parties and the CCMA; the basis on which a

commissioner may make any order as to costs in any arbitration; the right of any person or category of persons to represent any party in conciliation or arbitration proceedings; the circumstances in which the CCMA may charge a fee in relation to any conciliation or arbitration proceedings or for any services the CCMA provides and the amount of such fees; and all other matters incidental to performing the functions of the CCMA.

The CCMA is also mandated to conduct, oversee or scrutinise any election or ballot of a registered trade union or registered employers' organisation if asked to do so by the respective parties; and to conduct research and compile information/statistics on matters relevant to its functions/activities and to publish the information or research results. The CCMA may publish guidelines or provide employees, unions, employers, employers' organisations or bargaining councils with advice or training relating to the primary objects of the Labour Relations Act, 1995 including but not limited to establishing collective bargaining structures; facilitating the establishment of workplace forums: designing, establishing, electing and ensuring the functioning of workplace forums; preventing and resolving disputes and employees' grievances; disciplinary procedures; procedures in relation to dismissals; the process of restructuring the workplace; affirmative action and equal opportunity programmes; and the prevention of sexual harassment in the workplace.

The CCMA is also mandated to consider and determine applications for accreditation of councils and private agencies; and provide subsidies to accredited councils.

2.4.2 Other statutory dispute resolution institutions

2.4.2.1 Bargaining councils

Bargaining councils are joint employer-union bargaining institutions. They are formed in two steps. The initial step comes from the parties themselves. One or more registered trade union(s) and one or more registered employers' organisation(s) must agree to establish a bargaining council by adopting a constitution for the council. Then they must negotiate the terms of the constitution, as well as the sector (industry or service) of the economy and geographical area over which the council they intend to establish will have jurisdiction (Basson *et al.*, 2005).

Parties to the bargaining council are represented by their representatives on the council. The parties enjoy equal representation: half the representatives on the council must be appointed by the trade unions and the other half by the employers' organisations (Labour Relations Act, 1995, Section 30). Any registered trade union or registered employers' organisation may apply in writing to a council for admission as a party to that council at a later stage.

The constitution of a bargaining council must provide for the appointment of representatives to the council; the representation of small- and medium-sized enterprises on the council; the manner in which decisions are to be made in the council; the procedure for the resolution of disputes between parties to the council and between a party and its members; the procedure for the granting of exemptions from collective agreements concluded by the council; and the admission of additional registered trade unions and registered employers' organisations to the council.

Once the constitution has been agreed to by the parties, application is made to the Registrar of Labour Relations to register the council. Once a council is registered, it obtains all the powers, functions and duties of a council imposed by the Labour Relations Act, 1995, and it attains a legal personality: it can own property, enter into contracts in its own right and sue and be sued in its own name (RSA, 1995b, Section 29).

Bargaining councils have two major functions (RSA, 1995b, Section 29). The primary function is to negotiate collective agreements dealing with terms and conditions of employment or any other matters of mutual interest between/among its members. Bargaining councils also have a dispute resolution function, which extends to all employers and employees falling within the jurisdiction of the council, irrespective of whether they are members of the trade unions and employers' organisations that are parties to the council (Du Toit, 2006). If a dispute arises between an employers' organisation and a trade union that are parties to the bargaining council, the dispute must be resolved in terms of the dispute resolution procedure contained in the constitution of the council. If one of the parties to the dispute is not a party to the council but the dispute falls in the sector and area over which the council has jurisdiction, the dispute must still be referred to the council (Basson *et al.*, 2005). The council must attempt to resolve the dispute through conciliation. If conciliation fails (in the case of a rights dispute), the council must resolve the

dispute through arbitration if the Labour Relations Act, 1995 requires the dispute to be resolved through arbitration or if the parties agree that the council must arbitrate the dispute. In the case of an interest dispute, or where the Labour Relations Act, 1995 does not require the dispute to be resolved through arbitration or where the parties do not agree to arbitration, they may resort to a strike or lock-out. In any case, the bargaining council, where it exists, is always the first port of call by law. If there is no bargaining council, then the CCMA becomes the first institution of engagement (Du Toit *et al.*, 2006).

The Labour Relations Act, 1995, Section 52 provides that bargaining councils must apply to the CCMA for accreditation to perform dispute resolution functions in respect of non-parties. Accreditation is not necessary in the case of disputes between parties to the council. If the council is not in a position or is unwilling to perform dispute resolution functions itself, it may outsource the dispute resolution function from the CCMA or another accredited dispute resolution agency.

2.4.2.2 Private dispute resolution agencies

The Labour Relations Act, 1995 (RSA, 1995b, Section 127) also vests the CCMA with powers to licence private agencies to attempt to resolve disputes through conciliation and arbitration if the disputes remain unresolved after conciliation and if the Labour Relations Act, 1995 requires arbitration. Thus, any organisation can perform dispute resolution functions with the blessing of the Labour Relations Act, 1995 (RSA, 1995b) as long as it is accredited by the CCMA.

The CCMA may accredit an applicant to perform any function for which it seeks accreditation after considering whether the services provided by the applicant meet the CCMA's standards; provided that the applicant is able to conduct its activities effectively; the dispute resolvers are competent and independent; the applicant has an acceptable code of conduct to govern its dispute resolvers; the applicant uses acceptable disciplinary procedures to ensure that its dispute resolvers subscribe and adhere to the code of conduct; and the applicant's service is broadly representative of South Africa (RSA, 1995b, Section 127).

According to the Labour Relations Act, 1995, Section 128, an accredited council or accredited agency may charge a fee for performing dispute resolution functions. Fees charged must be in

accordance with tariffs or fees determined by the CCMA. A council's ability to charge fees for its dispute resolution depends on whether the parties to disputes are parties or non-parties to the council. Where no accreditation is required, there is no limitation on a council's ability to charge the parties to the dispute a fee. This includes circumstances where a dispute involves only parties to the council, where the parties to the dispute agree to council conciliation or arbitration, where an arbitrator enforcing a collective agreement of a council imposes an arbitration fee, and where a collective agreement permitting such a fee is extended to non-parties. Where, however, a council performs accredited functions involving non-parties to the council, the council may charge a fee only in circumstances in which the Labour Relations Act, 1995 (RSA, 1995b) allows a commissioner to charge a fee.

Bargaining councils and private agencies may apply to the CCMA for subsidies for performing dispute resolution functions in terms of the Labour Relations Act, 1995 for which the accredited agency is accredited and for training persons to perform those functions (RSA, 1995b, Section 132).

2.5 Dispute resolution under the auspices of the CCMA

According to the Labour Relations Act, 1995, Section 133 (RSA, 1995b), if a party refers a dispute to the CCMA, the CCMA must appoint a commissioner to attempt to resolve the dispute through conciliation. The appointed commissioner must attempt to resolve the dispute through conciliation within 30 days of the date the CCMA received the referral. However, the parties may agree to extend the 30-day period (RSA, 1995b, Section 135). If the CCMA appoints one commissioner in respect of more than one dispute involving the same parties, that commissioner may consolidate the conciliation proceedings so that all the disputes concerned may be dealt with in the same proceedings.

If the dispute remains unresolved after conciliation and a commissioner has issued a certificate of non-resolution, the CCMA must arbitrate the dispute if the Labour Relations Act, 1995 (RSA, 1995b) requires the dispute to be resolved through arbitration and if, within 90 days after the date on which that certificate was issued, some party to the dispute has requested that the dispute be resolved through arbitration; or (where the Labour Relations Act, 1995 requires the dispute to be

referred to adjudication at the Labour Court) if all the parties to the dispute consent in writing to arbitration under the auspices of the CCMA. Arbitrations may be conducted by the same commissioner who attempted conciliation. However, any party may object to the appointment of the same commissioner. Both parties may also, by agreement and in writing, request the CCMA to appoint a particular commissioner or a senior commissioner to attempt to resolve the dispute through arbitration (Labour Relations Act, 1995 (RSA, 1995b, Sections 135-6).

Figure 2.4 below summarises the flow of dispute resolution at the CCMA. (The figure includes alternative routes (in dotted lines) that a dispute can follow depending on jurisdiction. Jurisdiction will be discussed in detail later under 2.5.6.3.)

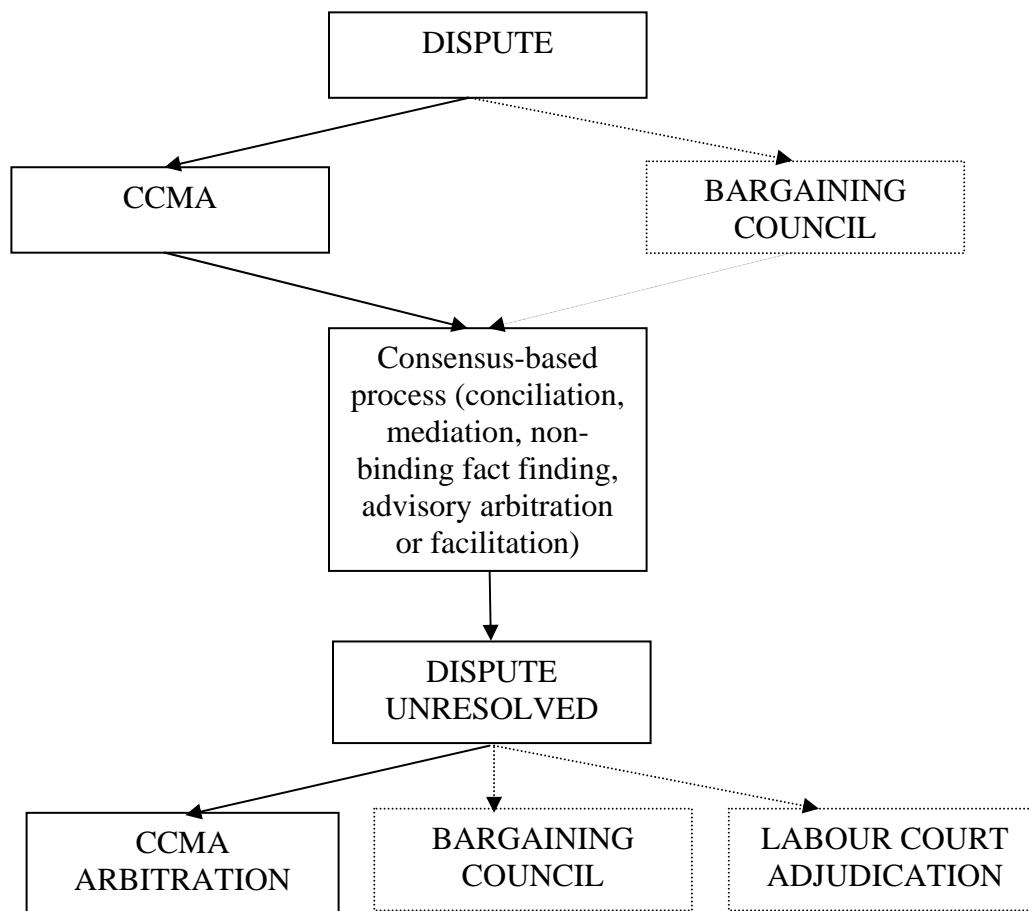


Figure 2.4 Schematic representation of the process of dispute resolution at the CCMA

2.5.1 Resolution of disputes through consensus-based processes

The first stage of statutory dispute resolution involves conciliation. This is compulsory: further steps in the dispute resolution process (such as arbitration, Labour Court adjudication or industrial action) depend on this conciliation process having been completed (Basson *et al.*, 2005). This initial stage of dispute resolution generally boils down to consensus-based processes, given that the resolution of the dispute is always subject to agreement by all the parties to the dispute (Bosch, Molahlehi & Everett, 2004).

In the next sections, these consensus-based processes (conciliation, mediation, non-binding fact finding, advisory arbitration and facilitation) will be discussed.

2.5.1.1 Conciliation

According to Basson *et al.* (2005), conciliation is a process whereby a neutral third party, the commissioner in the case of the CCMA, assists parties to a dispute to resolve their differences and reach their own mutually acceptable, enforceable and binding agreement. The conciliator helps the parties to develop options, consider alternatives and reach a settlement agreement that will address the parties' needs. The conciliation process focuses on consensus or agreement: the conciliator has no decision-making powers to determine and impose the final agreement on the parties (Venter, 2007). The settlement and the resolution regarding the dispute remain that found and agreed to by the parties themselves. Thus, the conciliator only tries to get the parties themselves to agree to a mutually acceptable settlement. The power to reach the final agreement always resides with the parties themselves (Basson *et al.*, 2005; Venter, 2007).

The procedure usually followed during conciliations is not rigid: depending on the circumstances of a particular case, some of the steps may not be used. The first step is introduction and housekeeping. The second step is an explanation of conciliation: that the conciliator plays a facilitating role only and does not make binding decisions on the outcome; that the conciliator merely helps the parties to the dispute to reach an agreed settlement; and that the decision regarding the dispute rests on the parties themselves (Bosch *et al.*, 2004). Ground rules will be laid down for the conduct of the process. At this stage, the parties may hand documentary evidence to the conciliator for perusal. The third step is opening statements. The conciliator will

call on both parties to make an opening statement: a brief summary of the events that led to the dispute. The opening statement makes it possible for the conciliator to identify the issues in dispute. He or she may also pose questions to obtain more clarity on these issues. There is no rule as to who has to give his or her statement first. However, the conciliator will usually call upon the person who referred the dispute to begin (Brand *et al.*, 2008).

Once the issues in dispute are determined, the conciliator decides whether they have jurisdiction to conciliate the dispute. If the conciliator lacks jurisdiction, he or she must explain the reasons for the lack of jurisdiction to the parties and terminate the meeting (Bosch *et al.*, 2004). The fourth step is considering the appropriate process to follow: conciliation, mediation, non-binding fact finding or advisory arbitration. Thus, as used in the Labour Relations Act, 1995 the term conciliation is a kind of woolly blanket that covers, and partially conceals, a variety of consensus-based procedures and methods. The conciliator will also decide whether to continue with the conciliation in consultation with both parties, or whether to have side meetings separately with each party. When one of the parties meets with the conciliator in a side meeting, the other party will have to leave the room (Bosch *et al.*, 2004). The fifth step is an analysis of the causes of the dispute. The conciliator will identify the needs and underlying interests of the parties and then, in consultation with both parties, isolate the causes of the dispute and work towards a common understanding thereof. Issues that are uncontroversial and issues in dispute will be determined (Brand *et al.*, 2008). The sixth step centres on settlement options: the conciliator focuses the parties on a possible outcome. The conciliator may further develop and suggest possible solutions. The seventh step is choosing a solution. The conciliator will work with the parties to isolate one or more options that will best meet their needs in an attempt to settle the dispute. If the parties are not willing to settle, the conciliator will inform them of the consequences of non-settlement. The final step is bringing the process to an end. If the parties reach an agreement, the conciliator will summarise all the issues and ensure that all issues have been attended to. The conciliator will assist the parties in drawing up a settlement agreement that must be signed by all parties concerned in the dispute. The conciliator then issues an outcome certificate to indicate that the matter has been resolved. If the parties do not reach an agreement, or at the end of the statutory 30-day period or any further period agreed between the parties, the conciliator will issue the outcome certificate of non-resolution to indicate that the dispute remains unresolved (Brand *et*

al., 2008). The commissioner must serve a copy of that certificate on each party to the dispute or to the person who represented a party in the conciliation proceedings; and the commissioner must file the original of that certificate with the CCMA. The CCMA may, by agreement between the parties or on application by a party, turn a settlement agreement into an arbitration award (Labour Relations Act, 1995, Section 142A).

2.5.1.2 Mediation

There is an overlap between the terms conciliation and mediation. According to Faris (2006), conciliation is a less proactive form of intervention, where the third party aids the disputants to reach their own agreement rather than seeking to suggest actively the terms of a possible agreement, as in mediation. According to Bendix (2004), mediation, like conciliation, is a process in which the mediator acts only in an advisory and conciliatory capacity, has no decision-making powers and cannot impose a settlement on either party. However, unlike in conciliation, the mediator is more proactive in moving the parties to a mutually agreeable outcome, stopping just short of actually handing down a final and binding decision (Venter, 2007). The mediator objectively advises the parties and makes proposals for a settlement, but essentially the disputants must resolve their own dispute (Faris, 2006). By contrast, in conciliation, the conciliator facilitates communication between the disputants, assists them to agree on a possible method for resolving the dispute and, if so requested, may give a non-binding opinion.

Mediation becomes imperative in situations where disputing parties are incapable of continuing negotiations, are unable to speak to one another directly on their own, or where, because of the inexperience of the negotiators, no progress can be made or no solution can be found (Venter, 2007). In these situations a mediator serves to diffuse tensions and elicit concessions from the parties, thus promoting progress towards a settlement. In collective bargaining parlance, mediation serves to narrow the gap in the settlement range (Bendix, 2004).

2.5.1.3 Non-binding fact finding

According to Brand *et al.* (2008), non-binding fact finding is when a conciliator collects information or hears the versions of the parties and then makes a non-binding finding on the facts without deciding on the solution to the overall dispute. Where fact finding is part of conciliation,

the power to decide on which procedure to follow is usually left to the fact finder. Where the parties voluntarily agree to such fact finding, they will set the powers of the fact finder.

2.5.1.4 Advisory arbitration

Advisory arbitration is akin to arbitration, but the determination is not binding on the parties (Brand *et al.*, 2008). Advisory arbitration is therefore a consensus-based process because it usually happens in the context of conciliation and is meant to encourage the parties to settle the dispute by agreement after the advisory award is rendered. The use of advisory arbitration is compulsory in disputes concerning refusal to bargain before resorting to a strike or lock-out (Bosch *et al.*, 2004).

2.5.1.5 Facilitation

Like conciliation, facilitation also involves the use of an independent third party. It seeks to help the parties reach an agreement without imposing a decision upon the parties (Brand *et al.*, 2008). However, conciliations focus on disputes and all the parties agree to go to conciliation or one party forces the other into the conciliation. Facilitations focus on structural and relationship (rather than distributive) issues, the third party helps to identify parties to the facilitation and then persuades them to get to the table (Du Toit, 2006). Facilitations also rarely relate to a single dispute, but rather relate to broader, complex and more general issues, such as restructuring. Because of the complexity of the issues, facilitations are commonly conducted in a problem-solving, less adversarial and more cooperative manner, and often include the training of participants in the subjects under facilitation (Brand *et al.*, 2008). Thus, while facilitations may be used to resolve disputes, they do not necessarily arise from a dispute but may be initiated in order to establish structures and further processes to manage conflict and prevent disputes (Basson *et al.*, 2005). In terms of the Labour Relations Act, 1995, facilitation is required specifically for the establishment of statutory councils (Section 40) and workplace forums (Section, 80, subsection 9). It is also a procedural choice for parties in dispute about large-scale disputes for operational requirements (Section 189A).

2.5.2 Resolution of disputes through arbitration

Unlike in consensus-based processes, the neutral third party plays an active role in resolving the dispute in arbitrations by conducting a hearing, receiving and considering evidence and submissions from the parties, determining or deciding the dispute between the parties, and making a final and binding award to which the parties must adhere (Venter, 2007). In other words, in arbitrations the third party has powers to make a final decision. Unlike in consensus-based processes, the parties do not have control over the outcome, in arbitrations although they can obviously influence it through their evidence and arguments. The decision regarding the dispute therefore lies with the arbitrator, and it is final and binding.

The discussion in the following sections will be on general provisions for arbitration proceedings, the effect of arbitration awards, mixed dispute resolution processes: con-arb, the powers of commissioners when attempting to resolve disputes, representation and assistance in CCMA proceedings, and jurisdictional issues.

2.5.2.1 General provisions for arbitration proceedings

The Labour Relations Act, 1995 (RSA, 1995b) Section 138, gives commissioners the discretion to conduct arbitrations in any form they deem appropriate, provided that they determine the dispute fairly and quickly, although they must deal with the substantial merits of the dispute with the minimum of legal formalities. Subject to the discretion of the commissioner as to the appropriate form of the proceedings, a commissioner is duty bound to permit a party to the dispute to give evidence, call witnesses, question the witnesses of any other party and address concluding arguments to the commissioner. Arbitration takes the following stages:

The first phase is the introductory phase, during which the arbitrator and parties introduce themselves. Seating arrangements and the language for the conduct of the proceedings are checked. Housekeeping rules are agreed upon. The arbitrator also briefly explains the purpose of arbitration and how it differs from consensus-based processes (Bosch *et al.*, 2004). At this stage, the arbitrator may offer to assist the parties in attempting to resolve the dispute through a consensus-based process. If the parties agree, the commissioner may suspend the arbitration proceedings and attempt to proceed by way of the consensus-based process. If no settlement is

reached by the end of the consensus-based process, the arbitration will resume. The arbitrator also highlights some elements of rules of evidence that will play a key role in judging the evidence presented (Brand *et al.*, 2008).

The party who bears the onus of proof generally begins the case. In a dismissal case, where the parties agree that the employee was dismissed, the onus is on the employer to prove the fairness of the dismissal. Accordingly, the employer party will begin. If the dispute centres on whether or not the employee was dismissed, or in a constructive dismissal, the employee bears the onus to prove the existence of a dismissal. The employee party then begins. In a dispute concerning an unfair labour practice, the onus is on the employee to prove that the employer committed an unfair labour practice. Therefore, the employee party will begin. The party that has to begin gives an opening address or statement first, submits to the arbitrator and to the other party any documents on which that party wishes to rely, and then the other party follows with its opening statement. After both parties' opening statements, the arbitrator considers whether the case poses any jurisdictional issues. If so, the jurisdictional issues should be dealt with before the hearing proceeds. The arbitrator subsequently narrows the issues in consultation with the parties, so as to identify the issues in dispute that require evidence and to shorten the proceedings (Brand *et al.*, 2008).

The second phase is the presentation of oral evidence. The parties are responsible for securing the presence of their witnesses at the hearing. A witness's evidence usually consists of three phases: evidence in chief, cross-examination and re-examination (Bosch *et al.*, 2004). The purpose of the evidence in chief is to place on record all the relevant facts of the case of which the witness has firsthand knowledge. The party or their representative may then question the witness to get his or her version on record. A party who appears in person (who represents himself or herself) may give evidence under oath by explaining what happened, and the arbitrator may play an inquisitorial role by asking questions. Once the witness's evidence in chief is completed, the other party or representative has the opportunity to cross-examine that witness. The main purpose of cross-examination is to highlight those statements made by the witness that the other party disagrees with or to discredit the witness so that the arbitrator disregards his or her evidence (Bosch *et al.*, 2004).

The purpose of re-examination is to clarify or explain issues that were raised during cross-examination. This is not an opportunity to place new evidence on record, but rather to complete or qualify answers that were given during cross-examination. If new evidence is handed in during re-examination, the opposing party must be afforded an opportunity to cross-examine the witness on the new issues. The arbitrator may disallow such new evidence if not satisfied that there is good reason to allow such new evidence and further cross-examination. The same procedure is followed regarding each witness. The second party also follows the same procedure: evidence in chief, cross-examination of witnesses by the other party, and re-examination of the witness by the witness's party. Once all witnesses have testified, the party closes its case (Bosch *et al.*, 2004).

When both parties have completed and closed their cases, the parties will be given an opportunity to present closing statements, also referred to as closing arguments, the parties' submissions to the arbitrator or, if submitted in writing, the heads of argument. The purpose of closing arguments is to remind the arbitrator of the issues to be decided, to summarise and analyse the evidence of each witness without repeating all the evidence, to apply the law to the facts, to dispose of the other side's arguments, to outline the relief sought, to refer the arbitrator to relevant judgments, and to deal with submissions and arguments presented by the other side. The party who began the case will usually give its closing argument first, the other party will respond with its closing argument, and the first party will have an opportunity to reply to the arguments of the second party. The second party has already had such an opportunity, because it presented its argument after hearing the argument of the first party (Bosch *et al.*, 2004).

After the hearing, the arbitrator considers the evidence and arguments. According to the Labour Relations Act, 1995 (RSA, 1995b) Section 138 sub-section 7, the commissioner must issue an arbitration award within 14 days of the conclusion of the arbitration proceedings, with brief reasons for the decision (sufficient to justify the conclusion). An arbitration award gives a summary of the evidence led by the parties and the commissioner's analysis of that evidence. The award proclaims in whose favour the commissioner has decided, and will usually include an order for relief (Bosch *et al.*, 2004). The award must be clear: if vague, it will be unenforceable. If it includes an order of compensation, the basis or formula should be included and the date when payment is due should be stipulated. The award also deals with the questions that had to be

decided, so that no matter is left undecided (Bosch *et al.*, 2004). The award must be signed by the commissioner, who must serve a copy of the award on each party to the dispute (or their representative) and file the original with the Registrar of the Labour Court.

The commissioner may not include an order for costs in the arbitration award, unless a party or the person who represented the party in the arbitration proceedings acted in a frivolous or vexatious manner in its conduct during the arbitration proceedings. The CCMA may charge an arbitration fee if the commissioner finds that the dismissal is procedurally unfair; if the CCMA resolves a dispute about the interpretation or application of a collective agreement that does not contain a procedure for conciliation and arbitration of such disputes, or if the agreed procedure or a bargaining council's dispute resolution procedure is inoperative; or if a party to a collective agreement has frustrated the resolution of the dispute under the procedure in the collective agreement. In the last two cases, the fees require the parties to bear the CCMA's process costs, because the CCMA is in effect performing a function that the parties themselves should have performed (Labour Relations Act, 1995, Section 138 sub-section 10).

If a party to the dispute fails to appear in person or to be represented at the arbitration proceedings, and that party is the complainant, the commissioner may dismiss the matter; or if that party is the respondent, the commissioner may continue with the arbitration proceedings in the absence of that party; or the commissioner may adjourn the arbitration proceedings to a later date (Labour Relations Act, 1995, Section 138 sub-section 5). As an internal measure of efficiency, the CCMA binds commissioners to avoid postponements altogether, or not to exceed 5% of their caseload per year. The CCMA requires arbitrations to be concluded within 60 days of the request for arbitration (Bhorat, Pauw & Mncube, 2007).

2.5.2.2 Effect of arbitration awards

Before the 2002 amendments to the Labour Relations Act, 1995, the CCMA did not have the jurisdiction to enforce its own arbitration awards. This caused difficulties when the CCMA had ruled in favour of an employee, but the employer did not comply with the award (Le Roux, 2002). In this situation, the employee had to approach the Labour Court to make the award an order of the court. If successful, and if the original award was one for compensation, the

employee would be entitled to issue a writ of execution, by agency of which the employee would utilise the deputy sheriff's services to seize the assets of the employer, which would then be sold to raise the monies to pay the compensation order (Le Roux, 2002). If reinstatement was granted, the employee would institute contempt-of-court proceedings against the employer. The above processes constituted effective enforcement mechanisms in theory but in practice the process was very difficult and time consuming. Where the employer had made an application for review or rescission of the award and the application had not yet been considered when the application for the award to be made an order of court was heard, the Labour Court would either deny the application to make the award an order of the court, or postpone it to be heard at the same time as the review application or after the rescission hearing. The court would also normally loathe finding the employer guilty of contempt of court (Le Roux, 2002).

In an attempt to resolve these problems, the 2002 amendment to the Labour Relations Act, 1995, Section 143, provides that an arbitration award (except an advisory award) is final and binding and may be enforced as if it is an order of the Labour Court, provided that the Director of the CCMA (or another person to whom this function has been delegated) certifies it (Hutchinson, 2007). In this regard, an employee who has been granted an award in his/her favour need not approach the Labour Court to have it made an order of court. It may be enforced as if it is an order of court, provided that the director certifies it. If the award grants compensation, the employee will be entitled to have a writ of execution issued by the registrar of the Labour Court. If the award reinstated the employee, the dismissed employee will be able to enforce it by way of contempt of court proceedings instituted in the Labour Court (Hutchinson, 2007).

If the employer fails/refuses to comply with a consensus-based settlement agreement, the other party may approach the Labour Court to have the agreement made an order of the Court; or may approach the CCMA to make the agreement an arbitration award and then apply to the Director of the CCMA to certify the award to enable it to be enforced as if it were an order of the Labour Court (Hutchinson, 2007).

2.5.3 Mixed dispute resolution processes: con-arb

The con-arb process is a mixture of both conciliation and arbitration. It is a “one-sitting” process that has two steps (Bosch *et al.*, 2004). The process starts with conciliation and, if the parties can not reach an agreement, the person who conducted the conciliation proceeds to arbitrate the dispute. The same person is therefore the conciliator and the arbitrator. The con-arb process tries to expedite the dispute resolution process by having conciliation and arbitration take place as a continuous process on the same day. Con-arb is compulsory in unfair dismissal or unfair labour practice disputes involving probationary employees (Labour Relations Act, 1995, Section 191 sub-section 5A). In all other cases, con-arb is applicable only if the parties to the dispute agree at the commencement of the dispute resolution procedure that, if conciliation fails, arbitration will take place immediately.

2.5.4 Powers of commissioners when attempting to resolve disputes

According to the Labour Relations Act, 1995 (Section 142), a commissioner who has been appointed to attempt to resolve a dispute has power to conciliate or arbitrate the dispute as the case may be; to determine the procedure to be followed in the conciliation or arbitration; to subpoena a person for questioning, experts to give evidence, or the production of documents if this may assist in the resolution of the dispute; to administer an oath or accept an affirmation from witnesses; and to order costs. At any reasonable time, but only with the written authorisation of the Labour Court, the commissioner may enter and inspect any premises on or in which any document or object that is relevant to the resolution of the dispute is to be found, or is suspected on reasonable grounds of being found there; to examine, to demand the production of, and to seize any document or object that is on or in those premises and that is relevant to the resolution of the dispute; to take a statement in respect of any matter relevant to the resolution of the dispute from any person on the premises who is willing to make a statement; and to inspect and retain for a reasonable period any of the books, documents or objects that may have been produced to, or seized by, the CCMA.

A person commits contempt of the CCMA if, after having been subpoenaed to appear before the commissioner, the person without good cause does not attend; fails to remain in attendance until excused by the commissioner; refuses to comply with the commissioner’s instructions or

requirements; insults, disparages or belittles a commissioner or prejudices or improperly influences the proceedings or improperly anticipates the commissioner's award; wilfully interrupts or misbehaves during the proceedings; or does anything which, if done in relation to a court of law, constitutes contempt of court. The CCMA does not have the power to institute criminal proceedings in the case of contempt of the CCMA, but it may refer the matter to the Labour Court for an appropriate order to be made against the contemptuous party (Labour Relations Act, 1995, Section 142).

2.5.5 Representation and assistance in CCMA proceedings

According to CCMA Rule Number 25 (cited in Bosch *et al.*, 2004), there is no provision for legal representation in conciliation proceedings. Instead, a party may appear in person or be represented only by a director or employee of that party and, if a close corporation, also by a member thereof; or by any member, official or office bearer of that party's registered trade union or registered employers' organisation. Persons falling outside this list of potential representatives are not allowed to represent a party in conciliations. At arbitration, legal representation is permitted, except if the dispute is about dismissal for conduct or capacity. However, even in these cases a party can use legal representation if all the parties, including the commissioner, consent or if the commissioner concludes that it is unreasonable to expect a party to deal with the dispute without legal representation after having considered the nature of the questions of law raised by the dispute, the complexity of the dispute, the public interest, and the comparative ability of the opposing parties or their representatives to deal with the dispute (Labour Relations Act, 1995, Section 138). Similarly, legal representation is not allowed in the conciliation stage of the con-arb process, but may be permitted at the arbitration stage, subject to the same rules governing legal representation in arbitrations.

The rationale for the exclusion of legal representation in conciliations and arbitrations is that legal representation tilts the balance in favour of the party with greater resources (generally the employer), and the participation by lawyers results in cases becoming more technical and complicated, as well as drawn out (prolonged) and expensive (Leeds & Wöcke, 2009). In addition, Leeds and Wöcke (2009) argues that lawyers often delay proceedings owing to their

unavailability or the approach adopted, and consequently place individual employees and small businesses at a disadvantage because of mounting costs and delayed justice.

2.5.6 Jurisdictional issues

The essential question in the context of jurisdiction is whether an institution has the power to hear the matter referred to it. There are four jurisdictional issues that arise in dispute resolution under the auspices of the CCMA: the existence of a dispute; parties to disputes; time lines for referral of cases to the CCMA; and jurisdictional disputes (Van Kerken, 2000). The following is a discussion of these jurisdictional issues.

2.5.6.1 Existence of a dispute

Since the function of the CCMA is to resolve disputes, the existence of a dispute is a primary jurisdictional requirement. The Labour Relations Act, 1995, does not require formal proof that there is a dispute. In practice, commissioners simply assume the existence of a dispute on the basis that an applicant has alleged that one exists, even where the conciliation or arbitration proceeds in the absence of the employer.

The non-referring party may allege that the matter had been settled by an agreement between the parties or by an agreement that is otherwise binding on them. Such an allegation goes to the core of the commission's jurisdiction to resolve the dispute, for it constitutes a denial that a dispute exists. If there is no dispute to resolve, there is no jurisdiction to conduct dispute resolution. If the existence of a dispute is denied in the case of a dismissal dispute, proof of the existence of a dispute becomes an integral part of the employee's onus to prove that he or she has been dismissed (Van Kerken, 2000).

2.5.6.2 Parties to disputes

The dispute must concern a matter of mutual interest and the parties to the dispute must be on the one side: one or more trade unions, one or more employees, or one or more trade unions and one or more employees; and on the other side: one or more employers' organisations, one or more employers, or one or more employers' organisations and one or more employers (Labour Relations Act, 1995, Section 134). The dispute must have been referred by a party to the dispute

or by someone on their behalf. The party who refers the dispute to the CCMA must copy the referral to all other parties to the dispute.

i) Who is an employee?

The Labour Relations Act, 1995 (RSA, 1995b) (Section 213), the Basic Conditions of Employment Act, 75 of 1997 (RSA, 1997) (Section 1), and the Employment Equity Act, 55 of 1998 (RSA, 1998a) (Section 1) all define an employee as any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, remuneration; and any other person who in any manner assists in carrying on or conducting the business of an employer.

In addition to this definition, the Labour Relations Act, 1995 (RSA, 1995b), in section 200A, elaborates that, unless and until the contrary is proven, a person who works for or renders services to any other person or institution is presumed, regardless of the form of the contract, to be an employee, if any one or more of the following factors are present: the manner in which the person works is subject to the control or direction of another person; the person's hours of work are subject to the control or direction of another person; in the case of a person who works for an organisation, the person forms part of that organisation; the person has worked for that other person for an average of at least 40 hours per month over the last three months; the person is economically dependent on the other person for whom he/she works or renders services; the person is liable to pay income tax; the person is provided with tools of trade or work equipment by the other person; or the person only works for or renders services to one person.

ii) Who is an employer?

The definition of an employee to a large extent helps define who an employer is: it is the party who is on the other end of the relationship. This gives the illusion that it is relatively easy to find the employer. However, difficulties may arise if a labour broker or temporary employment service is involved: the question that arises is whether the employee is in the service of the labour broker or the labour broker's client. In these cases, the realities of the relationship determine who the real parties are, irrespective of whether the parties attempt to create what appears to be a relationship between an independent contractor and its client (Theron, 2005).

iii) *What is a trade union?*

The Labour Relations Act, 1995 (RSA, 1995b), in section 213, defines a trade union as an association of employees whose principal purpose is to regulate relations between employees and employers, including any employers' organisations.

The Labour Relations Act, 1995 (RSA,1995b), in sections 4-5, protects the freedom of association of employees. It provides that every employee has the right to participate in forming a trade union or federation of trade unions, and to join a trade union subject to its constitution. This means that a union may determine in its constitution what types of employees may become members of the union, and what types of employees are disqualified from membership. The Labour Relations Act, 1995 Section 8 also provides trade union members with certain rights: every member of a trade union has the right, subject to the constitution of that trade union, to participate in its lawful activities; to participate in the election of any of its office-bearers, officials or trade union representatives; to stand for election and be eligible for appointment as an office bearer, official or trade union representative; and, if elected or appointed, to hold office and to carry out the functions of a trade union representative in terms of the Labour Relations Act, 1995 or any collective agreement. These rights also apply with regard to membership of a federation of trade unions.

iv) *What is an employers' organisation?*

The Labour Relations Act, 1995 (RSA, 1995b), in section 213, defines an employers' organisation as any number of employers associated together for the purpose, whether by itself or with other purposes, of regulating relations between employers and employees or trade unions.

The Labour Relations Act, 1995 (RSA,1995b), in sections 6-7, also grants and protects employers' rights to freedom of association in terms similar to those granted to employees: to join and participate in the activities of employers' organisations. Specifically, the Labour Relations Act, 1995 Section 8 provides that every employer has the right to participate in forming an employers' organisation or a federation of employers' organisations; to participate in its lawful activities; to participate in the election of any of its office-bearers or officials; and, if a natural person, to stand for election and be eligible for appointment as an office-bearer or official and, if

elected or appointed, to hold office; whereas, if a juristic person, to have a representative stand for election, and be eligible for appointment, as an office-bearer or official and, if elected or appointed, to hold office. The rights also apply in respect of membership of a federation of employers' organisations.

2.5.6.3 Time lines for referral of cases to the CCMA

The third jurisdictional issue relates to time periods: parties to disputes must refer disputes to the CCMA within the prescribed timeframes.

In many instances there is no time limit for referral to conciliation and a dispute may be referred within a reasonable time from the date it arose. However, in the case of dismissal, employees must refer an unfair dismissal dispute to the CCMA within 30 days of the date of the dismissal or, if there has been an internal appeal hearing, within 30 days of the employer making the final decision to dismiss or uphold the dismissal (RSA, 1995b, section 191). In the case of an unfair labour practice, the time period is 90 days from the date of the act or omission that allegedly constitutes an unfair labour practice or, if an employee only became aware of the occurrence at a later date, within 90 days of the employee becoming aware of such occurrence (RSA, 1995b, section 191). In the case of discrimination, the time limit is six months of the act or omission that constituted unfair discrimination. A time frame of 90 days also exists for requests for arbitration if a dispute remains unresolved after conciliation. Where a party wishes to object to the appointment of the same commissioner (who attempted conciliation) for arbitration, the time limit is seven days after the issue of the certificate of non-resolution (RSA, 1995b, section 136).

The days exclude the first day, include the last day and count all days, including weekends and public holidays. If the above time periods have lapsed, the referring party must apply for condonation to request the CCMA to condone the failure to refer the case timeously. An application for condonation must set out the grounds for seeking condonation and must include details on the degree of lateness, the reasons for the lateness, the referring parties' prospects of succeeding with the referral and obtaining the relief sought against the other party; any prejudice to the other party; and any other relevant factors (Bosch *et al.*, 2004).

2.5.6.4 Jurisdictional disputes

The fourth issue is that the CCMA does not have an inherent jurisdiction over labour disputes: it may attempt to resolve only those disputes that fall within its statutory jurisdiction (Van Kerken, 2000). Sometimes there is overlapping jurisdiction between bargaining councils and the CCMA; a dispute must be referred first to a bargaining council with jurisdiction or, in the absence of a council, to the CCMA. This means that the CCMA will not have jurisdiction over a dispute if there is a bargaining council, unless the council's dispute resolution procedures are inoperative or some party to the dispute frustrates resolution of the dispute through the council (Bosch *et al.*, 2004).

As with private agencies, bargaining councils only deal with disputes of interests and disputes relating to dismissals and freedom of association, although they may not arbitrate on the latter. Disputes centring on the disclosure of information to unions, organisational rights, the interpretation and application of collective agreements, agency shop, closed shop and statutory agreements, cancellation of a council's registration, demarcation, picketing, co-decision making, information to be given to workplace forums and the interpretation of the provisions relating to workplace forums are out of their jurisdiction (Bosch *et al.*, 2004).

Other exceptions are that certain disputes can only be referred to the Labour Court either directly or immediately upon trigger of the dispute or if the dispute remains unresolved after conciliation at the CCMA or bargaining council (unless all the parties to the dispute opt out of Labour Court adjudication in preference for arbitration in same forum as conciliation) (Bosch *et al.*, 2004).

The CCMA is mandated to resolve only the following disputes (disputes which the CCMA is not mandated to attempt to resolve are excluded):

i) Disputes in respect of freedom of association and general protections

These are disputes about the interpretation or application of freedom of association: what is meant by participation in lawful activities of a trade union or employers' organisation or their federations; and discrimination/victimisation for exercising the right to freedom of association (joining trade unions or employers' organisations or their federations). These disputes must be

referred to a bargaining council having jurisdiction, or to the CCMA where no bargaining council exists for conciliation. If conciliation fails, the dispute must be referred to the Labour Court for adjudication (RSA, 1995b, section 9).

ii) Disputes about collective bargaining

These disputes revolve around the interpretation, application and exercise of organisational rights: (what is meant by) sufficient representation, access, deduction of levies, trade union representatives, leave for trade union activities, disclosure of information to union, rights in the domestic sector, thresholds of representativeness and rights of union parties to councils (RSA, 1995b, sections 16, 21-22). These disputes must be referred to the CCMA for conciliation. If conciliation is unsuccessful, the union has the choice to engage in strike action or to invoke arbitration by the CCMA. Where the union takes strike action, it may not refer the dispute to arbitration for a period of twelve months thereafter. A bargaining council, even where one exists in the sector or area, has no jurisdiction.

Also under collective bargaining disputes are disputes about the interpretation or application of collective agreements (including agency shop or closed shop agreements and settlement agreements that have no dispute procedure, where the procedure is not yet effective or where one party blocks the use of the procedure); disputes relating to the application or interpretation of an agreement regulating employment conditions of a council whose registration has been cancelled; and jurisdiction disputes between public service bargaining councils. The dispute must be referred to the CCMA for conciliation, followed by arbitration if conciliation is unsuccessful (RSA, 1995b, sections 24, 33A). Disputes about the failure or refusal to admit a registered union with a significant interest in the workplace as a party to a closed shop agreement (RSA, 1995b, section 26), and disputes centring in the interpretation or application of the statute on bargaining councils, bargaining councils in the public service, statutory councils (RSA, 1995b, sections 38, 61-63) and ministerial determinations at the request of a statutory council (RSA, 1995b, section 45), must be referred to the CCMA for conciliation followed by Labour Court adjudication if conciliation fails. No bargaining council has jurisdiction (RSA, 1995b, section 26).

iii) *Unfair labour practice disputes*

Disputes centring in unfair conduct relating to promotion, probation (excluding dismissals related to probation), demotion, training, the provision of benefits, unfair suspensions or other disciplinary action short of dismissal, failure or refusal to re-employ or reinstate in terms of any agreement must be referred to a bargaining council having jurisdiction or to the CCMA where no bargaining council exists, for conciliation or, if this fails, arbitration. In the case of unfair discrimination and occupational detriment (other than dismissal) in terms of the protected disclosures, if conciliation fails at a bargaining council or at the CCMA, the dispute must be referred to the Labour Court for adjudication (RSA, 1995b, section 191).

iv) *Disputes involving workplace forums.*

These are disputes centring on the interpretation or application of the law in workplace forums: the establishment of workplace forums (which go to the CCMA for facilitation, followed by unilateral establishment of the forum by the CCMA if facilitation fails), trade union-based forums, meetings of workplace forums, review of the employer's disciplinary codes and procedures at the request of a newly established forum, and the implementation of provisions relating to consultation, joint decision making and disclosure of information. All these disputes must be referred to the CCMA for conciliation and, if conciliation fails, arbitration. A bargaining council, even where one applies in that particular area, has no jurisdiction (RSA, 1995b, sections 80, 86, 87, 89, 94).

v) *Disputes centring in strikes or lock-outs*

Disputes of interests must first be referred to the CCMA for conciliation. If conciliation fails, the parties are at liberty to engage in industrial action after notice or to invoke arbitration (a must in the case of disputes of interests in essential and maintenance services) (RSA, 1995b, sections 64, 74-75). Disputes about refusal to bargain must first be referred to the CCMA for conciliation, and advisory arbitration follows if conciliation fails. Disputes to do with picketing (Section 69) and unilateral changes to terms and conditions of employment must be referred to the CCMA for conciliation and, if conciliation fails, the dispute must be referred to the Labour Court for adjudication. A bargaining council, even where one operates in the sector or area, has no jurisdiction.

vi) *Disputes arising from unfair dismissals*

Unfair dismissals, including unfair discrimination, minor retrenchment, operational requirements, dismissals arising from participation in unprotected strikes, refusal to reinstate after maternity leave, transfer of employment contracts, dismissal because the employee made protected disclosure, and dismissals in the context of closed shop agreements must first be referred for conciliation to a bargaining council having jurisdiction, or to the CCMA where no bargaining council exists. If conciliation is unsuccessful, the dispute must be referred to the Labour Court for adjudication (RSA, 1995b, sections 186-187, 188A, 189A, 191).

Dismissals for conduct and capacity, one employee retrenchment, non-renewal or unfair renewal of fixed-term contract, selective non-re-employment, constructive dismissals, dismissal relating to probation, reason for dismissal unknown to employee (RSA, 1995b, section 191) and disputes over entitlement to severance pay (RSA, 1997, section 41) must also be referred to a bargaining council or, in the absence of a bargaining council, to the CCMA for conciliation and arbitration if conciliation is unsuccessful.

vii) *Disputes arising from other pieces of legislation*

Disputes about the interpretation or application of the Basic Conditions of Employment Act, 1997 (section 80) and disputes concerning employees' rights and the protection of those rights under the Employment Equity Act, 1998 (sections 10 and 52), must be referred to the CCMA for conciliation, followed by Labour Court adjudication if conciliation fails. Disputes under the Skills Development Act, 97 of 1998, (RSA, 1998b) in respect of the interpretation or application of a learnership agreement or the contract of employment of a learner, as well as the termination of a learnership agreement or the learner's contract of employment, must be referred to the CCMA for conciliation first and arbitration later if conciliation is unsuccessful. A bargaining council, even where one operates in the sector or area, has no jurisdiction (RSA, 1998b, section 19).

2.6 Summary

This chapter highlights the legal framework of the CCMA. In particular, the chapter began with an overview of dispute resolution before 1995 and ends with statutory dispute resolution since

1995. The chapter discussed the CCMA and other dispute resolution institutions namely bargaining councils and private dispute resolution agencies. The emphasis was on the CCMA: the institution, dispute resolution under the CCMA, the resolution of disputes through consensus-based processes, the resolution of disputes through arbitration, general provisions for arbitration proceedings, the effect of arbitration awards, the resolution of disputes through the mixed process of con-arb, the powers of commissioners when attempting to resolve disputes, representation and assistance in CCMA proceedings, and jurisdictional issues.

The next chapter, Chapter 3, provides a detailed discussion of the theoretical framework of evaluating a dispute resolution system. It introduces the performance indicators and provides a review of the performance of the CCMA in terms of these performance indicators.

CHAPTER 3: EVALUATING A DISPUTE RESOLUTION SYSTEM

3.1 Introduction

This chapter sets out the theoretical framework for evaluating a dispute resolution system. The chapter discusses the key performance indicators that will be used in evaluating the CCMA. Along these performance indicators, the chapter provides a review of the performance of the CCMA.

3.2 Theoretical framework for evaluating a dispute resolution system

According to Owen (2007), evaluation is the process of making a judgment about the value or worth of an object under review. The logic of evaluation is fourfold: establishing criteria of worth (on what dimensions must the object under review do well?); constructing standards (how well should the object under review perform?); measuring performance and comparing with standards (how well did the object under review perform?); and synthesising and integrating evidence into a judgment of merit or worth (what is the worth of the object under review?).

Given that concerns for efficiency, accessibility and the quality of dispute resolution motivated the establishment of the CCMA, these criteria (dimensions) shall serve as the key performance indicators in the evaluation of the dispute resolution function of the CCMA. There is rich theoretical and empirical support for these metrics for evaluating and comparing dispute resolution systems. Genn, Lever, Gray and Balmer (2006) identified the accessibility of a dispute resolution system as a critical success factor of the system. To this, Budd and Colvin (2008) added efficiency (expedition), equity and voice. According to Budd and Colvin (2008), efficiency is a standard of economic or business performance. It is the effective, profit-maximising use of scarce resources and it captures concerns with productivity, competitiveness, and economic prosperity. The voice dimension of dispute resolution systems captures the extent to which individuals are able to participate in the operation of the dispute resolution system or to have meaningful input in dispute resolution: that is the quality of the actual process of dispute resolution (Budd & Colvin, 2008). Equity is a standard of treatment: fairness and unbiased decision making. It entails quality of outcomes (Budd & Colvin, 2008). These two elements therefore fall under the quality of dispute resolution.

The next section looks at the following key performance indicators: efficiency, accessibility and quality of dispute resolution.

3.2.1 Efficiency

According to Budd and Colvin (2008), an efficient dispute resolution system is one that is expeditious in resolving disputes with high settlement rates in a minimum of time. Systems that are slow and that take a long time to produce a resolution are inefficient; systems with shorter timeframes that produce a relatively quick resolution are efficient (Budd & Colvin, 2008).

Efficiency in respect of conciliations and arbitrations relates to the time it takes the CCMA to conclude the actual conciliation, con-arb or arbitration proceedings (that is, the duration of the process). The Labour Relations Act, 1995, requires conciliations to be concluded within 30 days of the date of referral. Although the Labour Relations Act, 1995 prescribes that the CCMA should arbitrate disputes in 90 days, the CCMA sets a higher internal efficiency target of 60 days (Bhorat *et al.*, 2007). The CCMA therefore has to conclude arbitrations in 60 days of the date of the request for arbitration. Efficiency also relates to the CCMA's success/settlement rate of dispute resolution: that is, total disputes referred versus total disputes resolved.

The financial year at the CCMA is from 1 April of one year to 31 March of the other year. During its first year of operation (November 1996 to 31 March 1997) the CCMA processed only 2 917 cases (Benjamin & Gruen, 2006). Thereafter, as Figure 3.1 below shows, the number of cases has increased sharply: 67 319 in 1997/1998; 86 182 in 1998/1999; 88 756 in 1999/2000; 103 096 in 2000/2001; 110 639 in 2001/2002; 118 254 in 2002/2003; 127 715 in 2003/2004 (Benjamin & Gruen, 2006); 128 018 in 2004/2005 (CCMA, 2005); 125 065 in 2005/2006 (CCMA, 2006); 123 472 in 2006/2007 (CCMA, 2007); and 133 350 in 2007/2008 (CCMA, 2008). This represents an average of 500 referrals every working day.

Figure 3.1 below represents this information.

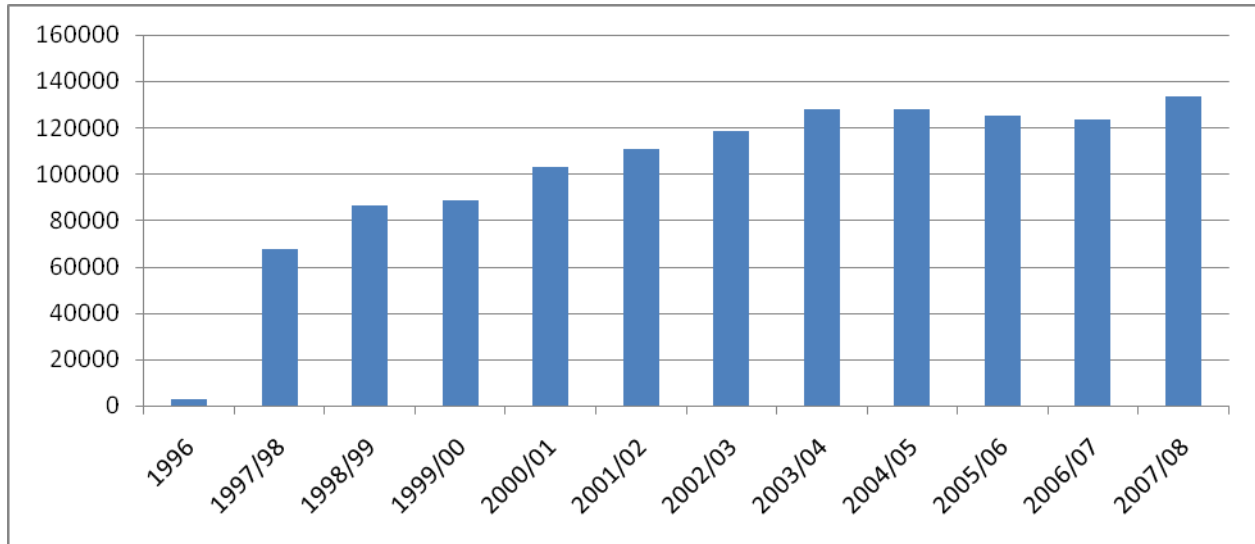


Figure 3.1 CCMA national caseload from 1996 to 2008
(Benjamin & Gruen, 2006, p. 5; CCMA Annual Reports, 2005-2008)

Figure 3.2 indicates that, since the inception of the CCMA, unfair dismissal disputes have accounted for the largest percentage of issues in dispute (around 80%). Unfair labour practice disputes, mutual interest disputes, collective bargaining and severance pay disputes each contribute less than 10% of disputes (CCMA, 2008). The data in Figure 3.2 goes back to 2004 only, not to 1996.

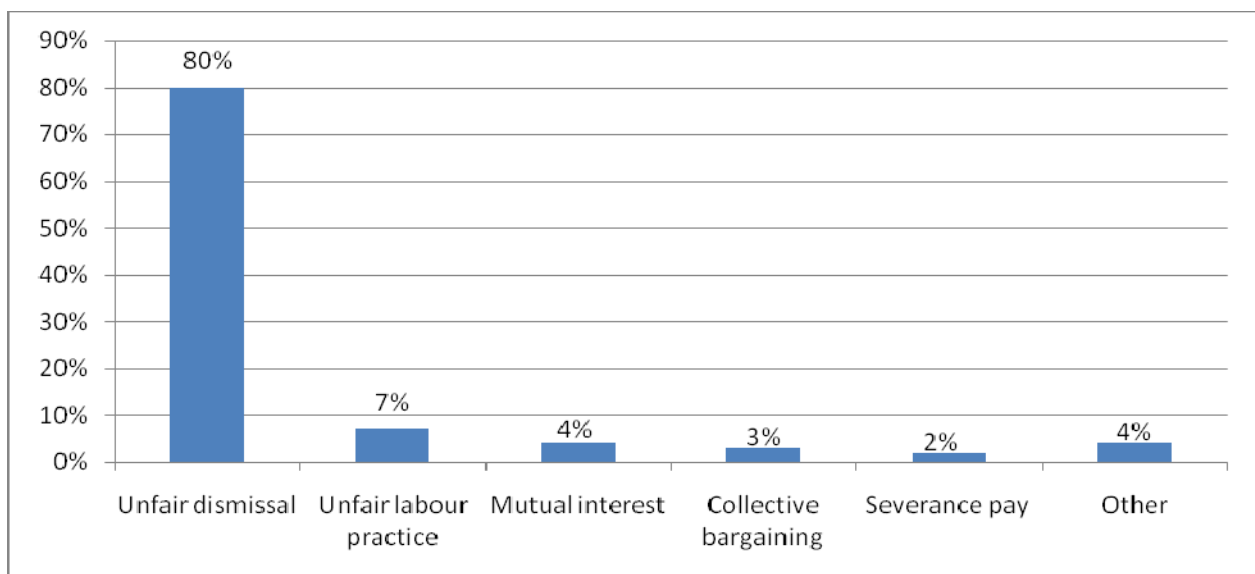


Figure 3.2 CCMA national referrals by dispute from 2004 to 2008
(CCMA Annual Reports, 2005-2008)

Similarly, since inception, demand for CCMA services by province has remained consistent. Gauteng (Johannesburg and Pretoria) accounts for the greatest caseload (around 37%), followed by KwaZulu-Natal (around 18%) and the Western Cape (around 13%). The other offices each contribute less than 10% of the national caseload (CCMA, 2008).

Figure 3.3 indicates that the breakdown of referrals by sector also shows trends. The retail sector consistently accounts for the highest number of referrals (around 16%). The security, domestic, business and professional, and building and construction sectors each contribute around 10% of referrals. The food and beverage sector and the agricultural and farming sector each contribute around 5% of referrals. Other sectors (mining, motor, distribution, wholesale, paper and printing, services, public service, health, chemical, contract cleaning) each contribute close on 4% of referrals.

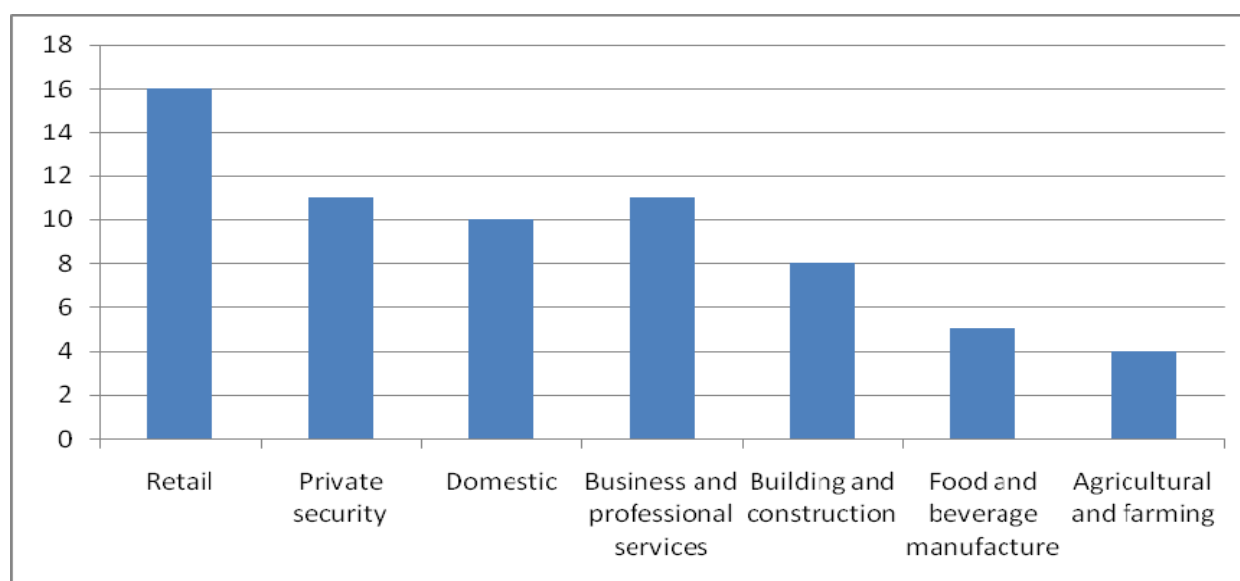


Figure 3.3 CCMA national referrals by sector from 2004 to 2008
(CCMA Annual Reports, 2005-2008)

Since the inception of the CCMA, conciliations (including pre-conciliations and conciliations under con-arbs) and arbitrations account for the majority of processes conducted: conciliations account for 50 to 60% of cases and arbitrations for 30% of cases. Pre-conciliations involve CCMA officials phoning the parties involved in the dispute prior to a hearing being scheduled in order to resolve the dispute without recourse to a formal conciliation hearing. The process was

introduced to fast track the resolution of uncomplicated disputes (Bhorat *et al.*, 2007). Points in limine and rescissions account for 10% and 5% respectively. In the case of pure conciliations, more than three-quarters are finalised in one day, a majority of the remaining in two days and the remainder in three days. Of the arbitration awards rendered, more than half are in favour of employee parties and the remainder in favour of employer parties. Less than 10% of the arbitrations are settled in a single meeting, more than half in two hearings, about a quarter in three hearings, and the rest in four hearings (Benjamin, 2009).

A significant proportion of the cases referred to the CCMA are not within its jurisdiction and are screened out at the initial stage. The number of incorrectly referred cases consistently has been in the vicinity of 30% throughout the life of the CCMA, reaching as high as 35% in some years. Roughly half of these should have been referred to other dispute resolution institutions such as bargaining councils (25%), the Department of Labour (19%), and the Labour Court (2%). The bulk of the remainder (45%) are referred away because the referral documentation is incomplete or the referrals are premature (Benjamin, 2009).

Figure 3.4 below summarises conciliation and arbitration turnaround times (in days) and settlement rates of the CCMA (in percentage) from 2004 to 2008.

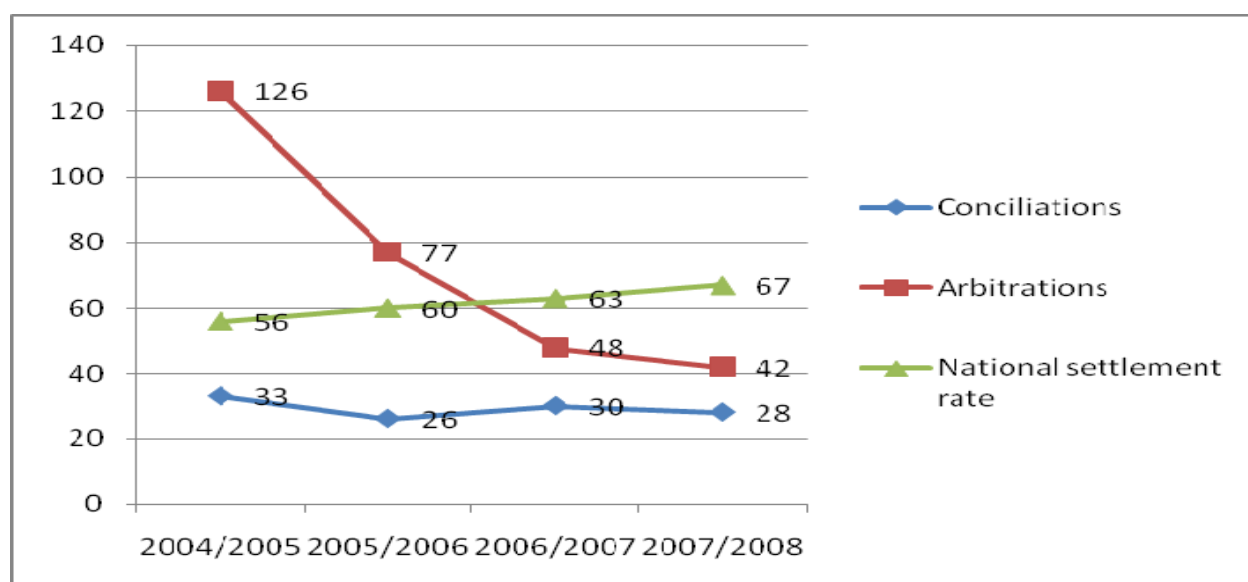


Figure 3.4 Turnaround times and settlement rates of the CCMA from 2004 to 2008

(Benjamin & Gruen, 2006, p. 36ff; CCMA Annual Reports, 2005-2008)

3.2.2 Accessibility

Accessibility in dispute resolution means the ability to effectively access redress systems and to participate in the redress processes in order to achieve just outcomes (Genn *et al.*, 2006). A founding tenet of the CCMA is that access should be easy and free and that justice is not a function of either formal education or disposable income (Leeds & Wöcke, 2009).

The ability to access redress systems effectively means that personal characteristics, such as education levels, and situational characteristics, such as the availability of service centres or the cost of legal services, do not constitute barriers preventing a party from invoking the dispute resolution system (Genn *et al.*, 2006). In this sense, accessibility is a function of the informality of dispute resolution, the absence of costs of dispute resolution and the widespread coverage of dispute resolution providers independent of resources or expertise.

Informality facilitates the ability to participate effectively in dispute resolution processes. An informal dispute resolution institution is one in which dispute resolution procedures/processes are so simple that the users themselves can start a case, prepare it for submission to the institution and present it at a hearing, with little or no support or assistance (Genn *et al.*, 2006). In other words, informal dispute resolution ensures the simplicity of the process of referral and the simplicity of the actual dispute resolution proceedings: that is, an absence of the formalities (strictness in conforming to law) typical of courtroom proceedings. The process is user friendly, even for individual, non-unionised employees without legal representation (Genn *et al.*, 2006). Unlike an ordinary court, which involves dense technicalities and compels legal representation, an informal dispute resolution process presupposes less formal, less technical and less complicated procedures, and legal representation is, or should be, unnecessary (Roberts & Palmer, 2005).

Specifically, informal dispute resolution processes do not strictly apply, or permit proceedings to be loaded with principles of law, thereby reducing the chances for an ordinary employee to approach the institution virtually unaided, present his/her own case in simple, non-technical language and obtain relief. Informal dispute resolution processes do not strictly adhere to or permit parties to raise rules of procedure or courtroom tactics of formal legalistic reasoning

(Roberts & Palmer, 2005). Neither do they adhere to or permit parties to adhere to strict rules of evidence. An informal system dispenses with standards of evidence and the application of formal rules of evidence to offers of proof which characterise court proceedings. In informal dispute resolution processes, the parties prove their cases on a balance of probabilities (Brand *et al.*, 2008). This means that the arbitrator will weigh the respective cases of the two parties and that the party whose version is more probable will be successful. The arbitrator will be guided by questions such as ‘what probably happened’ and ‘which version is more probable or likely’. Thus, an award could probably be based on evidence that is normally inadmissible in a court of law.

Benjamin (2007) notes that the CCMA emphasises the expeditious resolution of disputes in a non-technical and non-legalistic manner. The absence of complicated referral procedures is a successful feature facilitating access to the CCMA. It has ensured that literacy and a lack of skill are not entry barriers to the system. The only procedural requirements are that an applicant should submit two forms (one for the referral to conciliation and one for the referral to arbitration) in which the dispute is described in general terms. In con-arb, one form suffices. On top of this, while CCMA rules prescribe pleadings, witness lists, discovery of documents or pre-arbitration meetings at which the issues are narrowed and defined, these requirements are dispensed with in practice (Benjamin, 2007). The absence of formal pleadings and pre-arbitration procedural requirements has also greatly limited the technical point taking that pleadings often cause. This is effective in promoting access to the CCMA (Benjamin, 2007). Furthermore, in limine hearings for technical points such as jurisdiction, condonation or legal representation accounted for only 10% of processes conducted by the CCMA from 2004 to 2008, an indication that not many such applications are made (Benjamin, 2009).

Leeds and Wöcke (2009) also find the CCMA to be accessible, given the excessive number of disputes referred to the CCMA and the high number of out-of-jurisdiction cases. They deduce that, given South Africa’s level of employment, the excessive number of disputes referred to the CCMA is largely due to the ease of access to the CCMA.

Brand (2000) also states that the high patronage of the CCMA by low-salaried, low-education (matric and below) domestic, security and retail workers signifies that the CCMA is accessible. Furthermore, a very small percentage of parties use any form of representation, either in conciliation or arbitration. Benjamin (2009) corroborates that the majority of cases are referred by low-paid and low- or semi-skilled workers.

The second element of accessibility entails the costs of dispute resolution. According to Hay *et al.* (1996), the costs of dispute resolution stem from legal fees, orders of costs to the other party and the actual dispute resolution service fees. These costs have the potential to bar employees who cannot afford them from accessing dispute resolution institutions. The CCMA provides a free dispute resolution service. Although the CCMA may make orders of costs, Levy and Venter (2006) state that the commissioners appear hesitant to award costs; very few costs awards are actually made, and these only in exceptional cases. Benjamin and Gruen (2006) found that orders of costs were awarded in only 0.466% of cases from 2001 to 2005, which equates to a total of 89 cost awards being issued over the entire four-year period. In the year 2006/2007, only 0.7% of awards included costs. Of these, two thirds were awarded against employees (Levy & Venter 2006).

3.2.3 Quality of dispute resolution

According to Ury *et al.* (1988), a disputant's satisfaction with dispute resolution depends partly on how much the resolution fulfils his or her interests, including whether the disputant believes that the resolution is fair (quality of outcome). Regardless of outcome, however, a disputant's satisfaction with dispute resolution depends largely on the perceived fairness of the dispute resolution procedure (that is, quality of the actual process of dispute resolution) (according to Ury *et al.*, 1988).

The Labour Relations Act, 1995 (RSA, 1995b) (Section 138) vests commissioners with the discretion to decide on the manner in which the dispute resolution process is conducted in order to determine the dispute fairly and quickly; and with an obligation to deal with the substantial merits of the dispute with the minimum of legal formalities. According to Benjamin (2007), the wording 'fairly and quickly' emphasises the obligation to balance the requirements of fairness

and expedition to ensure that disputes are resolved quickly without depriving the parties of their rights. Where these two considerations conflict, the arbitrator must promote the requirements of fairness to prevent injustice. Brand *et al.* (2008) express the same idea when they argue that efficiency and accessibility are not ends in themselves. Hence, efficiency or expedition does not mean that commissioners should proceed in a rough and ready manner, merely rushing through the proceedings in order to resolve the dispute at all costs while ignoring the interests, actual needs and rights of the disputing parties. Likewise, the quest for informality does not justify disorderly or simplistic proceedings. The essence of informality is simply that disputes should be dealt with in a less formal, less complicated manner and that as little time as possible should be devoted to compliance with procedural formalities or technicalities. The moment that efficiency and accessibility become the only prevailing considerations, the CCMA loses sight of its function, namely to resolve disputes. Thus, alongside efficiency and accessibility it is necessary to consider the element of the quality of dispute resolution.

Of the two elements relating to the quality of dispute resolution (namely quality of outcomes (equity) and quality of the actual process of dispute resolution (voice), the Labour Relations Act, 1995 (RSA, 1995b) emphasises the quality of the actual process of dispute resolution as discussed under 2.5.1.1 and 2.5.2.1. It provides that a party who is dissatisfied by an arbitration award or a ruling may apply either to the CCMA for the review or rescission of the award or ruling, as the case may be, or to the Labour Court for review, although not for appeal (RSA, 1995b, sections 144-145).

An award or ruling can be varied or rescinded if it was sought erroneously or made in the absence of any affected party; if it is ambiguous, contains an obvious error or omitted a material aspect that should have been included; or if it was granted as a result of a mistake common to the parties to the proceedings (Le Roux, 2007). An award or ruling is made erroneously if there is an irregularity in the proceedings or if it is not legally competent for the court to make the award or ruling, or if there existed at the time of issue a fact of which the judge was unaware that would have precluded the granting of the award or ruling and that would have induced the judge, if he had been aware of it, not to grant the judgment (Le Roux, 2007).

The Labour Court may set aside an agreement, award or ruling on review if there is a defect in the arbitration proceedings in that the commissioner: committed misconduct in relation to his/her duties; committed a gross irregularity of procedural requirement in the conduct of the arbitration proceedings; or exceeded his/her powers; or if the agreement, award or ruling has been obtained improperly under bribery and corruption (Hutchinson, 2009). If the award is set aside, the Labour Court may determine the dispute in the manner it considers appropriate, or remit the dispute to the CCMA for fresh arbitration, with recommendations as to appropriate procedures to be followed to determine the dispute afresh (Hutchinson, 2009).

According to Craig (2008), the difference between an appeal and a review is that, in an appeal, a superior court questions a lower court's decision and its findings of law and of fact and replaces the lower court's decision with its (the superior court's) own decision. In a review, however, the superior court does not question the findings of fact and of law of the lower court, unless the findings are not justifiable in terms of the reasons given for the decision. Instead, the superior court questions the process of decision making of the lower court. Thus, the function of review is not to overturn decisions that judges disagree with: rather, it is to ensure that decisions have been taken validly in accordance with the law. Review is therefore concerned with the process of decision making and not with the substance or merits of decisions (Bosch *et al.*, 2004).

The Constitutional Court fortified this tenet in *Sidumo v Rustenburg Platinum Ltd* (2007 12 BLLR 1097 (CC)). The Court held that CCMA arbitration awards and rulings constitute administrative action as defined in Section 1 of the Promotion of Administrative Justice Act, 3 of 2005, and as such are subject to the extended review standard set under the said Promotion of Administrative Justice Act, 2005 (Partington & Van der Walt, 2008). The Court held that the correct standard of review of a commissioner's award or ruling is the reasonableness standard: that an administrative decision will be reviewable if it is one that a reasonable decision maker could not reach. In other words, it should be reviewed if the decision is not rationally connected with the information before the commissioner and the reasons for it (Partington & Van der Walt, 2008).

The test of reasonableness is so stringent that it wraps a mantle of deference on commissioners' awards or rulings. The Labour Court will only interfere where it discerns something overwhelming or outrageous or absurd or irrational, in other words, where a decision is so unreasonable or outrageous that no reasonable authority could ever have come to it or that no right-thinking person could support it; where the decision is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it; or where the decision is so absurd that the decision maker must have taken leave of his senses (Hoexter, 2008).

Given the spotlight that the law itself trains on the process of dispute resolution and not the merits of the outcome of dispute resolution, quality of dispute resolution in this research shall mean quality of the process of dispute resolution.

According to Ferreira (2004), in trying to manage the torrent of cases, as well as to achieve efficiency targets, the CCMA has put commissioners under extraordinary pressure to achieve settlements. They are required to handle five or six conciliations and two or three arbitrations per day. In order to do this, commissioners have used unconventional methods to put pressure on the parties during conciliation hearings; have had to conclude hearings in two or three hours which is too short to reach agreement, and have adopted "robust" policies, which include very truncated forms of arbitration hearings and the prohibition of postponements, save in exceptional circumstances. According to Brand (2000), these practices prejudice the parties' rights to a fair procedure.

Brand (2000) reports that commissioners judge parties swiftly in conciliations on a fairly superficial assessment of the facts (a form of truncated fact finding) and suggest a settlement that they tell the parties will be imposed on them in arbitration if they do not agree. This kind of fact finding followed by advisory arbitration is quite successful in settling matters, but it raises serious questions about the quality of conflict resolution. Such settlements run the risk of either failing to address the real underlying causes of the dispute or the real needs of the parties. They also often may be mere superficial compromises that address manifestations of the conflict only (Brand, 2000). According to Brand (2000), if one does not slow down and address real causes

and needs in a dispute situation, and if one does not seek out optimum rather than compromise solutions, the conflict tends to remain unresolved and to manifest itself again in another guise. Too much haste also encourages too much involvement by the conciliator in the substance of the dispute. This undermines the perceptions of independence and impartiality and ultimately compromises the legitimacy of the process. The high degree of intervention by the conciliator creates suspicions of bias and raises questions about conciliator ethics (Brand, 2000). It also affects the extent to which parties are prepared to comply with the settlements reached in conciliation.

A familiar refrain regarding CCMA conciliations is non-compliance by the employer parties with settlement agreements reached at conciliation. According to Brand (2000), non-compliance with an arbitration award is understandable, given that the award is an imposition by a third party, but non-compliance with a consensus-based settlement agreement is perplexing: it insinuates that the parties are pressured into settlements that they consequently renege upon. Christie (1998) also states that some employers complained that some commissioners attempts to settle disputes by persuading the employers to pay money to make them go away.

All these issues or failings raise questions about the quality of dispute resolution under the CCMA. According to Sprigg and Jackson (2006), this situation reflects the asymmetrical pressures that appear to be very common in call centres: the incongruity between good customer service (which may require a long call to resolve a particular query) and high utilisation (short calls and the minimisation of time between calls). Sprigg and Jackson (2006) state that, where performance emphasis is placed on quantity, quality suffers: the pursuit of quantity is attained at the expense of quality. In the case of the CCMA, the inherent conflicts in attempting to expedite dispute resolution in a predetermined time in order to maximise efficiency and delivering quality dispute resolution, irrespective of the complexity of the dispute, are obvious. Procedural requirements that are crucial to resolving disputes may be dispensed with to maximise efficiency.

3.3 Summary

This chapter provided a brief overview of the performance of the CCMA from its inception until the year 2008. In terms of efficiency, the early years, from 1996 to 2004, were characterised by

severe underachievement. Improvements started trickling in from 2004, and significantly thereafter. The chapter looked at the accessibility of the CCMA and the discussion painted a positive picture of its accessibility. The CCMA offers a free dispute resolution service. The high patronage of the CCMA by low-salaried, low-education (matric and below) employees alludes to the informality of the dispute resolution function of the CCMA, considering that an overwhelming majority of disputes handled at the CCMA are unfair dismissal disputes in which legal representation is excluded except with the consent of both parties and the arbitrator. In terms of the quality of dispute resolution, the chapter raised the tendency of the CCMA to compromise its process in order to meet its case load: that is, the failure on the part of the CCMA to balance expedition or efficiency and natural justice.

In the next chapter, Chapter 4, the research methodology that has been employed in this study will be discussed.

CHAPTER 4: RESEARCH METHODOLOGY

4.1 Introduction

Research methodology, the topic of this chapter, focuses on the specific individual (not linear) steps, methods and procedures or tasks in the research process. Specifically, this chapter discusses the research design, sampling, measuring instrument, reliability and validity, data analysis and informed consent.

4.2 Research design

Research boils down to making observations and interpreting the observations. Before launching into the actual observations and subsequent analysis, however, the researcher needs a plan to determine what is going to be observed and analysed: the why and how. That is what research design is all about. A research design is a plan or blueprint of how one intends conducting the research (Babbie & Mouton, 2001).

This research made use of ex post facto correlational research design, in which the researcher used neither random assignment nor experimental manipulation (Babbie & Mouton, 2001).

The researcher concedes that, unlike an experimental design, an ex post facto design lacks the ability to control variance (Babbie & Mouton, 2001; Kerlinger & Lee, 2000) to maximise systematic variance, minimise error/within-group variance and control extraneous variance. It also falls short of maximising internal validity, namely, the logical confidence with which systematic variance can be attributed to the variance in the independent variable of interest. The researcher rather recognises that, in an ex post facto design, internal validity is threatened by the following extraneous effects which challenge the conclusion that the systematic variance is due to the effect postulated by the operational hypothesis: history (events other than the treatment that occur during the study), maturation (natural/spontaneous changes that occur over time in the units of analysis), testing, and instrumentation (changes in the calibration of measuring instruments over time) (Babbie & Mouton, 2001; Kerlinger & Lee, 2000).

Despite these shortcomings, this design was chosen mainly because it is valuable in research studies that do not permit true experimentation, random assignment or the experimental manipulation of the research subjects. This is the case in the present study, given that the evaluation in question was based on experience and not on impact. The evaluation is not about the impact of dispute resolution by the CCMA. It centres on the perceptions of the users of the CCMA regarding the efficiency, accessibility and quality of dispute resolution of the CCMA, based on their experiences.

4.3 Sampling

The method of sampling that was used in this research is cluster sampling. For a period of two weeks (14 to 25 September 2009), questionnaires were administered to complainant and respondent parties to dispute resolution at the CCMA, Cape Town. All parties (complainant and respondent) who participated in dispute resolution at the CCMA during this time were included in the sample subject to their voluntary acceptance of participation. The respondents were approached to complete the questionnaire immediately after closure of the hearing. The researcher targeted 300 respondents, but only managed to obtain 218 questionnaires. While the office handles around 60 hearings per day, meaning a population of 120 potential respondents on average, the researcher could only administer approximately 25 questionnaires per day. There were a number of reasons for this, ranging from parties being unwilling to participate, parties being in haste to leave the premises, parties deficient in English being unable to participate on account of language barriers, and some potential parties slipping through as the researchers were attending to other respondents.

Compared to non-probability sampling, probability sampling is an effective method for the selection of study elements. There are two reasons for this: the first is that probability sampling avoids the researchers' conscious or unconscious biases in element selection (Babbie & Mouton, 2001). If all elements in the population have an equal or unequal and subsequently weighted chance of selection, there is an excellent chance that the sample so selected will closely represent the population of all elements (Babbie & Mouton, 2001). Second, probability sampling permits estimates of sampling error. Although no probability sample will be perfectly representative in all respects, controlled selection methods permit the researcher to estimate the degree of expected

error in that regard (Kerlinger & Lee, 2000). In this respect, given that the research used cluster sampling (a probability sampling method), the gap between the target and sampling populations is <0.50 . Thus, the representative-ness of the sample as a function of the method of sampling, and the statistical power of the subsequent statistical analyses as a function of sample size, was achieved. This conclusion is based on the fact that, according to Babbie and Mouton (2001) and Kerlinger and Lee (2000), a sample is considered representative if it provides an accurate portrayal of the characteristics of the sampling population through statistics. Inferential statistical analysis is possible in the case of probability sampling only (which is what was utilised in this research).

4.4 Measuring instrument

The research used a self-developed questionnaire (Appendix A) which is structured around the three performance indicators.

Informality and quality of dispute resolution were measured using a four-point horizontal graphic rating scale, ranging from 'strongly disagree' to 'strongly agree'.

The units of analysis were employee/trade union and employer/employers' organisation parties to dispute resolution at the CCMA. These elements were chosen on the understanding that, having participated in dispute resolution under the CCMA they were capable of providing a truthful appraisal of the efficiency, accessibility and quality of dispute resolution of the CCMA. The questionnaire items will be discussed in the sections that follow.

4.4.1 General/demographic details

The questionnaire tapped the following general/demographic details of the respondents: identity of the party completing the questionnaire (employer/employers' organisation or employee/trade union); nature of the dispute (unfair dismissal, unfair labour practice, mutual interest, severance pay, or other as specified by the respondent); the respondent's position in the workplace (managerial, supervisory, below supervisory); and the sector in which the dispute fell (retail, private security, domestic, business and professional services, agricultural and farming, food and beverage, building and construction, or other as specified by the respondent). Employee or trade

union parties only were also asked their highest qualification (degree and above, diploma, matric or below matric) and their wages per month (up to R2500, between R2501 and R5000, between R5001 and R7500, over R7501). The employers were asked to indicate the size of their enterprise: micro-business/domestic employer (1 to 9 employees), very small business (10 to 19 employees), small business (20 to 49 employees), medium business (50 to 100 employees) and big business (more than 100 employees). The limits of 100, 50, 20 and 10 employees correspond to the definitions of a big business, small business, a very small business and a micro-business set out in the National Small Business Act, 102 of 1996 (RSA, 1996).

The respondents were also asked to indicate what process had been used in the resolution of their dispute: conciliation, con-arb or arbitration, and whether or not they had been a party to conciliation, con-arb or arbitration before. The questionnaire also asked the participants to indicate what type of representation they had used in the arbitration: self-representation (appeared in person), trade union representation, employers' organisation representation or legal representation; and whether they had requested legal representation and, if so, whether the request had been granted or not.

4.4.2 Efficiency

Secondary data (Annual Reports of the CCMA) was used to determine the efficiency of the CCMA. The questionnaire also asked the respondents to indicate whether their process: either conciliation or arbitration, had been concluded within the statutory 30-day and 60-day limit as well as how many hearings their conciliation or arbitration had taken before closure.

4.4.3 Accessibility

The general/demographic details formed part of the measurement of accessibility. Accessibility was measured with reference to informality of process of referral and informality of the actual process of dispute resolution: conciliation and arbitration.

The informality of the process of referral was measured by the following statements: "The process of referral of a dispute to the CCMA is complex." "The CCMA referral forms are easy to complete." "Knowledge of labour law is necessary to be able to complete CCMA referral forms."

“Knowledge of labour law is necessary to understand the CCMA’s dispute resolution rules/procedures.” “I requested the Help Desk to help me complete the CCMA referral forms.”

The informality of the actual process of conciliation was measured by the following statements: “The conciliation hearing was so formal I felt like I was in court.” “Knowledge of labour law is necessary to participate effectively in the conciliation.” “The Commissioner used too much legal language in the conciliation.” “The other party used too much legal language in the conciliation.” “The other party raised strict rules of procedure in the conciliation.” “The Commissioner strictly applied or permitted strict rules of procedure in the conciliation.”

The informality of the actual process of arbitration was measured by the following statements: “The hearing was overloaded with matters of labour law.” “The hearing was overloaded with complicated procedures.” “The arbitration hearing was so formal I felt like I was in court.” “Knowledge of labour law is necessary to participate effectively in the arbitration hearing.” “The Commissioner used too much legal language in the arbitration.” “The other party used too much legal language in the arbitration.” “The other party raised strict rules of procedure in the arbitration.” “The Commissioner strictly applied or permitted strict rules of procedure in the arbitration.”

4.4.4 Quality of dispute resolution

The quality of the conciliations was measured by the following statements: “The Commissioner adequately explained the conciliation process.” “The Commissioner adequately explained his/her role in the conciliation.” “The Commissioner adequately explained the parties’ role in the conciliation.” “The Commissioner provided me enough opportunity to explain my case in the conciliation.” “The Commissioner hurried through the conciliation hearing with no real attempt to conciliate the dispute.” “The Commissioner provided me enough opportunity to contribute in shaping the outcome of the conciliation.” “The Commissioner properly determined the nature of the dispute.” “The Commissioner acted fairly throughout the conciliation hearing.” “The Commissioner appeared to be biased towards the other party.” “The Commissioner adequately explained possible next steps in case of non resolution at conciliation.” (Employee party only) “The Commissioner adequately explained my rights in case of non compliance, by the employer

party, with a settlement agreement.” (Regardless of whether or not the dispute was resolved at conciliation) “The Commissioner sufficiently attempted/helped to resolve the dispute.”

The quality of the arbitrations was measured by the following statements: “The Commissioner adequately explained the arbitration process.” “The Commissioner adequately explained his/her role in the arbitration.” “The Commissioner adequately explained the parties’ role in the arbitration.” “The Commissioner provided me enough opportunity to state my case in the arbitration.” “The Commissioner provided me enough opportunity to defend my case in the arbitration.” “The Commissioner hurried through the hearing without adequate attention to details of the dispute or to our interests, rights and needs.” “The Commissioner addressed the substantial merits of the dispute in the hearing.” “The Commissioner acted fairly throughout the arbitration hearing.” “The Commissioner provided me enough opportunity to question the other party in the hearing.” “The Commissioner provided me enough opportunity to question the other party’s witnesses in the hearing.” “The Commissioner appeared to be biased towards the other party.” “The Commissioner provided me enough opportunity to give evidence.” “The Commissioner provided me enough opportunity to call witnesses.” “The Commissioner provided me enough opportunity to submit concluding arguments.” “The Commissioner refused to grant a postponement in circumstances where postponement was very appropriate.” (Employee party only) “The Commissioner adequately explained my rights in case of non compliance, by the employer party, with an arbitration award.”

4.5 Reliability and validity

The construction and evaluation of a measuring instrument rests on two technical considerations: reliability and validity (Field, 2009). To assess the internal consistency reliability of the measuring instrument in this research, a reliability item analysis test was done.

Hereinafter, INF REF represents the informality of the process of referral; QLTY CON represents the quality of conciliation; INF CON represents the informality of the actual conciliation; INF ARB represents the informality of the actual arbitration; and QLTY ARB represents the quality of arbitration. The number that prefixes the code is the question/statement number in the questionnaire.

As per Table 4.1 below, the reliability analysis of the informality of referral subscale yielded a Cronbach's alpha of 0.70 and a standardised alpha of 0.68 meaning that the subscale is slightly reliable. In the case of inter-item correlations, 8 INF REF yielded the least correlation, of less than 0.20. However, this was maintained because the impact when deleted was very insignificant.

Table 4.1 Reliability/item analysis for informality of the referral process

variable	Summary for scale: Mean=14.1308 Std.Dv.=3.13557 Cronbach alpha: .702189 Standardized alpha: .684030 Average inter-item corr.: .338983 Valid N:107				
	Mean if deleted	Var. if deleted	Stdv. if deleted	Itm-Totl Correl.	Alpha if deleted
7 INF REF	11.13084	6.730544	2.594329	0.405859	0.676581
8 INF REF	10.97196	8.681457	2.946431	0.138271	0.752829
9 INF REF	11.52336	5.782165	2.404613	0.663540	0.559194
10 INF REF	11.63551	5.820422	2.412555	0.636030	0.571206
11 INF REF	11.26168	6.473578	2.544323	0.456650	0.654685

INF REF = informality of the process of referral. The number is the question/statement number in the questionnaire

As per Table 4.2 below, the quality of conciliations subscale yielded a Cronbach's alpha of 0.92 and a standardised alpha of 0.92 meaning that the subscale is very reliable. All inter-item correlations produced good reliability results, thus no items came out as candidates for deletion.

Table 4.2 Reliability/item analysis for quality of conciliations

variable	Summary for scale: Mean=40.2374 Std.Dv.=5.60096 Cronbach alpha: .923083 Standardized alpha: .926213 Average inter-item corr.: .524363 Valid N:139				
	Mean if deleted	Var. if deleted	Stdv. if deleted	Itm-Totl Correl.	Alpha if deleted
13 QLTY CON	36.75539	26.91859	5.188313	0.743104	0.914996
14 QLTY CON	36.84892	26.07070	5.105947	0.744078	0.913933
15 QLTY CON	36.90648	26.15672	5.114364	0.672874	0.916891
16 QLTY CON	36.86331	25.62880	5.062490	0.775377	0.912430
17 QLTY CON	36.86331	26.72232	5.169364	0.522262	0.924252
18 QLTY CON	36.94964	25.51545	5.051282	0.828046	0.910339
19 QLTY CON	36.94964	26.60897	5.158389	0.655938	0.917538
20 QLTY CON	36.93525	25.81595	5.080940	0.753539	0.913411
21 QLTY CON	36.90648	26.21428	5.119988	0.566108	0.922727
22 QLTY CON	36.87770	26.52461	5.150205	0.706167	0.915623
23 QLTY CON	36.92806	26.98763	5.194962	0.611645	0.919280
24 QLTY CON	36.82734	27.07810	5.203662	0.643707	0.918109

QLTY CON = quality of conciliation. The number is the question/statement number in the questionnaire

As shown in Table 4.3 below, the informality of conciliations subscale yielded a Cronbach's alpha of 0.82 and a standardised alpha of 0.84. All inter-item correlations yielded good reliability results meaning that the subscale is very reliable. Therefore no items required to be deleted.

Table 4.3 Reliability/item analysis for informality of conciliations

variable	Summary for scale: Mean=18.6714 Std.Dv.=3.53886 Cronbach alpha: .828682 Standardized alpha: .842469 Average inter-item corr.: .497670 Valid N:213				
	Mean if deleted	Var. if deleted	StdV. if deleted	Item-Totl Correl.	Alpha if deleted
25 INF CON	15.40376	9.611629	3.100263	0.498975	0.820287
26 INF CON	16.00939	8.666578	2.943905	0.489610	0.832960
27 INF CON	15.30047	9.149155	3.024757	0.716713	0.783141
28 INF CON	15.40376	8.625713	2.936956	0.735777	0.773892
29 INF CON	15.41315	8.552316	2.924434	0.768013	0.767783
30 INF CON	15.82629	9.110671	3.018389	0.488110	0.826380

INF CON = informality of the actual conciliation. The number is the question/statement number in the questionnaire

As indicated in Table 4.4 below, the reliability analysis for the informality of arbitrations subscale yielded a Cronbach's alpha of 0.92 and a standardised alpha of 0.93 meaning that the subscale is very reliable. All inter-item correlations produced good reliability results.

Table 4.4 Reliability/item analysis for informality of arbitrations

variable	Summary for scale: Mean=23.8617 Std.Dv.=5.19843 Cronbach alpha: .923367 Standardized alpha: .932229 Average inter-item corr.: .661572 Valid N:94				
	Mean if deleted	Var. if deleted	StdV. if deleted	Item-Totl Correl.	Alpha if deleted
51 INF ARB	20.74468	20.31779	4.507526	0.821712	0.907077
52 INF ARB	20.70213	21.10276	4.593774	0.815122	0.909025
53 INF ARB	20.79787	19.96978	4.468756	0.879410	0.902493
54 INF ARB	21.30851	21.59631	4.647183	0.486445	0.937112
55 INF ARB	20.64894	21.50441	4.637285	0.821885	0.909876
56 INF ARB	20.71277	20.46005	4.523279	0.851380	0.905365
57 INF ARB	20.91489	19.88637	4.459414	0.817038	0.907075
58 INF ARB	21.20213	20.71446	4.551314	0.600263	0.927263

INF ARB = informality of the actual arbitration. The number is the question/statement number in the questionnaire

According to Table 4.5 below, the reliability analysis for the quality of arbitrations subscale yielded a Cronbach's alpha of 0.93 and a standardised alpha of 0.93 as well meaning that the

subscale is very reliable. All inter-item correlations produced good reliability results. Therefore no items were indicated as candidates for deletion.

Table 4.5 Reliability/item analysis for quality of arbitrations

variable	Summary for scale: Mean=51.4127 Std.Dv.=7.01987 Cronbach alpha: .934277 Standardized alpha: .939424 Average inter-item corr.: .518424 Valid N:94				
	Mean if deleted	Var. if deleted	Stdv. if deleted	Itm-Totl Correl.	Alpha if deleted
35 QLTY ARB	48.03175	43.20535	6.573077	0.694034	0.929585
36 QLTY ARB	47.98413	43.76165	6.615259	0.685736	0.930056
37 QLTY ARB	48.03175	43.33232	6.582729	0.718991	0.929216
38 QLTY ARB	48.04762	42.71202	6.535443	0.772802	0.927846
39 QLTY ARB	48.09524	42.14966	6.492277	0.788636	0.927160
40 QLTY ARB	48.26984	42.51448	6.520313	0.570951	0.933223
41 QLTY ARB	48.28571	42.68027	6.533014	0.727108	0.928688
42 QLTY ARB	48.20635	42.95742	6.554191	0.700744	0.929345
43 QLTY ARB	48.30159	42.55984	6.523790	0.686254	0.929578
44 QLTY ARB	48.25397	43.90376	6.625991	0.600250	0.931670
45 QLTY ARB	48.28571	41.91837	6.474440	0.535918	0.935831
46 QLTY ARB	48.22222	42.80776	6.542764	0.734379	0.928608
47 QLTY ARB	48.20635	42.92567	6.551769	0.668856	0.930032
48 QLTY ARB	48.30159	42.62333	6.528655	0.677901	0.929789
49 QLTY ARB	48.38095	42.20408	6.496467	0.603349	0.932297
50 QLTY ARB	48.28571	42.71202	6.535443	0.654547	0.930387

QLTY ARB = quality of arbitration. The number is the question/statement number in the questionnaire

As indicated by the high Cronbach's alpha values, the results indicate that the items are good measures of the variables.

In terms of validity, the questionnaire in the present study was developed while being guided by the theorising on the essence of efficiency, informality and quality of dispute resolution. It was developed in a checklist manner, based on the statutory requirements prescribed in the Labour Relations Act, 1995 and discussed under 2.5.1.1 and 2.5.2.1. The questionnaire was administered after being pre-tested on a small sample of respondents.

4.6 Data analysis

Babbie and Mouton (2001) describe data analysis as a process of bringing order, structure and meaning to the mass of collected data for it to make sense.

STATISTICA version 9 (StatSoft Inc., 2009) was used to analyse the data. Summary statistics were used to describe the variables. The distributions of the variables are presented in histograms and/or frequency tables. Medians or means have been used as measures of central location for ordinal and continuous responses and standard deviations and quartiles have been used as indicators of spread.

When ordinal response variables were compared versus a nominal input variable, non-parametric ANOVA methods were used. The Mann-Whitney test was used for completely randomised designs. A p-value of $p < 0.05$ was used to represent statistical significance, and 95% confidence intervals were used to describe the estimation of unknown parameters.

4.7 Informed consent

The items in the questionnaire were preceded by an informed consent page that communicated the purpose of the study; the identity of the researchers, the research supervisor and the University Research Coordinator (for purposes of transparency and accountability); the procedures of participation; potential risks and discomforts (that participation in the study would not predispose anyone to any risk, discomfort or inconvenience, except for the time needed to complete the questionnaire); potential benefits of the study for subjects and/or society; and that there was no payment for participation in the study. The respondents were also assured of the confidentiality and anonymity of their responses. It was indicated that any information obtained in connection with this study that could be identified with them would remain confidential, would be used solely and only for purposes of knowledge generation, and would be disclosed only with their permission or as required by law. To ensure anonymity, the participants were not asked to provide their personal, organisation or other identification details. The participants were also informed of their rights to participate or not to participate and told that if they volunteered to participate, they were at liberty to withdraw at any time without consequences of any kind, and that they would also refuse to answer any questions they did not want to answer and still remain in the study. The respondents were kindly requested to confirm (by ticking a text box) that they had read and understood the information provided above and that they agreed to participate.

4.8 Summary

This chapter discussed the research methodology that the research has utilised. Specifically, it focused on research design, sampling, measuring instrument, reliability and validity, data analysis and informed consent.

In the next chapter, Chapter 5, the research results obtained during the data collection are reported.

CHAPTER 5: PRESENTATION OF RESEARCH RESULTS

5.1 Introduction

Building on the previous chapters (the literature review and the research methodology), this chapter reports the findings obtained during the data collection on each of the three performance indicators: efficiency, accessibility and quality of dispute resolution. The results are presented first as experienced by all the respondents, regardless of group, and then as experienced by the groups. Missing values did not present a problem in this study. With very few and negligible exceptions, the questionnaires were filled in completely. However, there are various figures for N because when group comparisons are made, the sample size shrinks. For example, half the total sample was employee parties, and the other half employer parties.

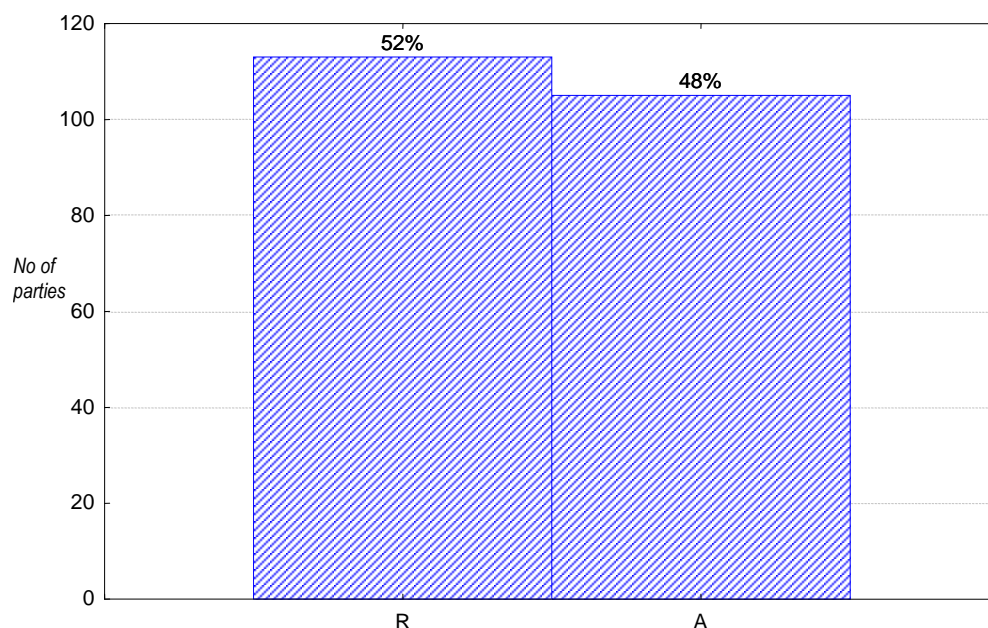
The results concerning the demographics of the sample will be discussed first, before the results are presented in terms of each of the three performance indicators.

5.2 General/demographic information

The following sections report general/demographic data with respect to the identity of the parties completing the questionnaire (employer or employee party); referrals by dispute; the respondent's position in the workplace (managerial, supervisory, below supervisory position); referrals by sector; education level and earnings; employer size; process undertaken; times at the CCMA (first or nth time) and type of representation used.

5.2.1 Identity of parties

Figure 5.1 below indicates that 113 respondents (52%) were employer/employers' organisation parties, while 105 respondents (48%) were employee/trade union parties. This means there was a good balance between employee and employer parties in the sample.



R = employer/employers' organisation party; A = employee/trade union party

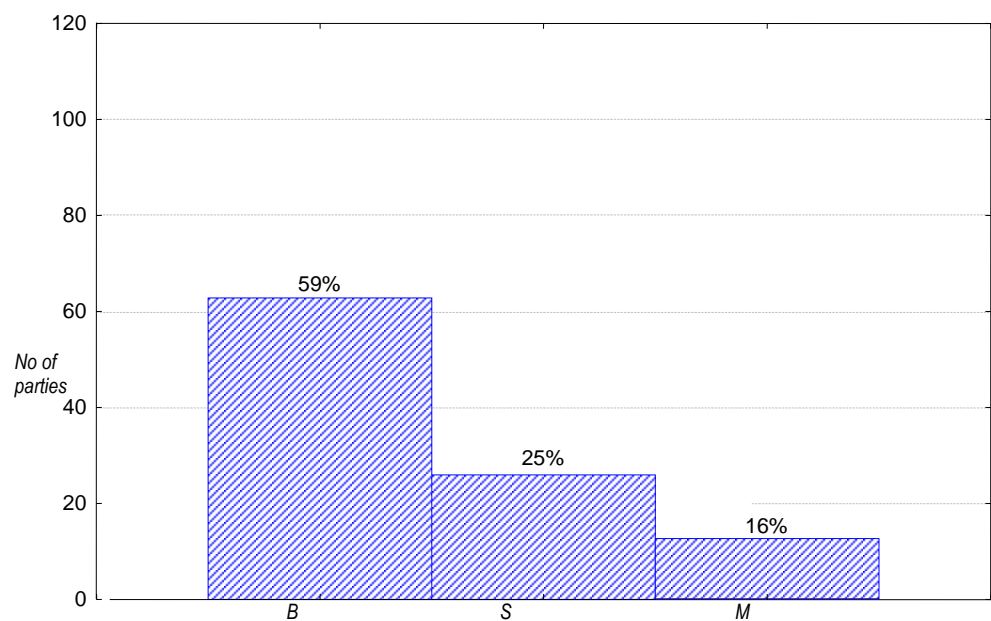
Figure 5.1 Identity of party completing the questionnaire

5.2.2 Employee parties' position, earnings and qualifications

The results confirm the findings of the literature review, namely that low-rank, low-education and low-salaried employees patronise the CCMA. Figure 5.1a below shows that, in terms of position in the workplace, 62 (59%) employee parties were below supervisory level, 26 (25%) were supervisors and 17 (16%) held managerial positions. In other words, the majority of the respondents held a low rank in their workplace.

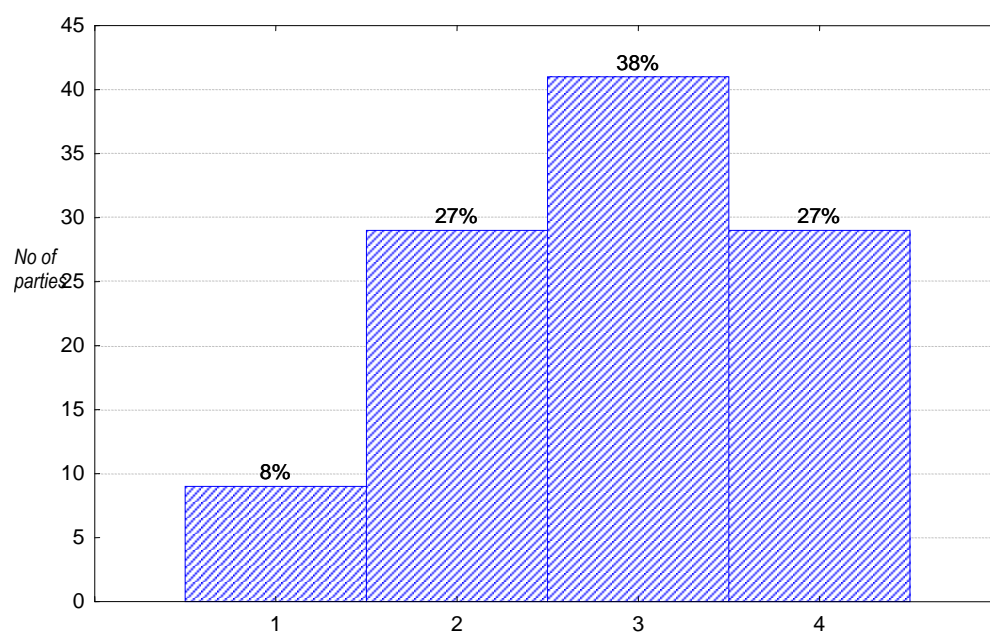
As shown in Figure 5.1b below, the majority of the applicant parties (70; representing 65%) were low-education parties (matric and below). Twenty-nine (27%) employee parties reported not having matric, 41 (38%) reported having a matric qualification only, 29 respondents (27%) reported possessing a diploma and nine (8%) reported possessing a degree (and higher).

As shown in Figure 5.1c below, respondents earning less than R5000 constituted a majority of the sample: 64 in total, representing 59%. Thirty-four (32%) reported earning less than R2500, twenty-nine (27%) reported earning between R2501 and R5000, eight reported earning between R5001 and R7500, representing 7%, and thirty-six (34%) reported earning over R7501.



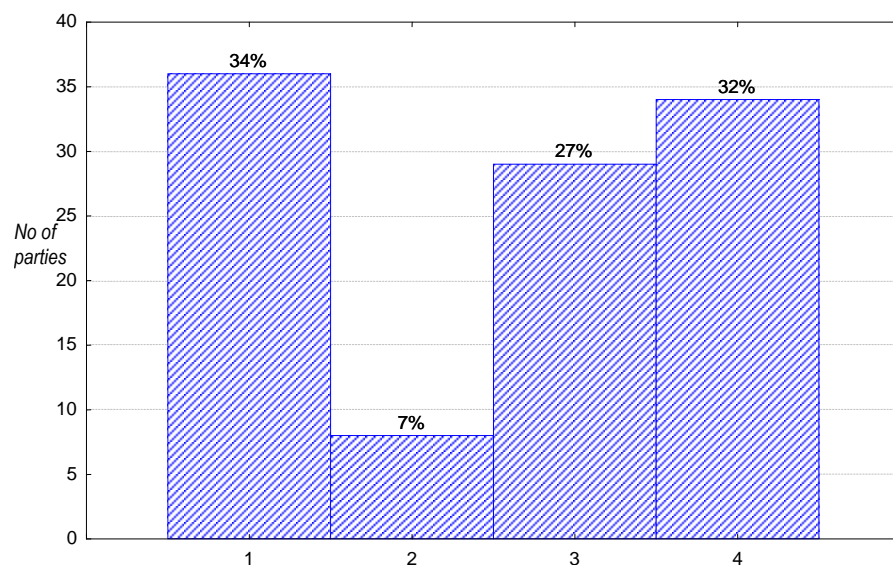
B = Below supervisory position; S = Supervisory position; M = Managerial position

Figure 5.1a Employee/trade union parties' position in the workplace



1 = degree and higher; 2 = diploma; 3 = matric; 4 = below matric

Figure 5.1b Qualifications

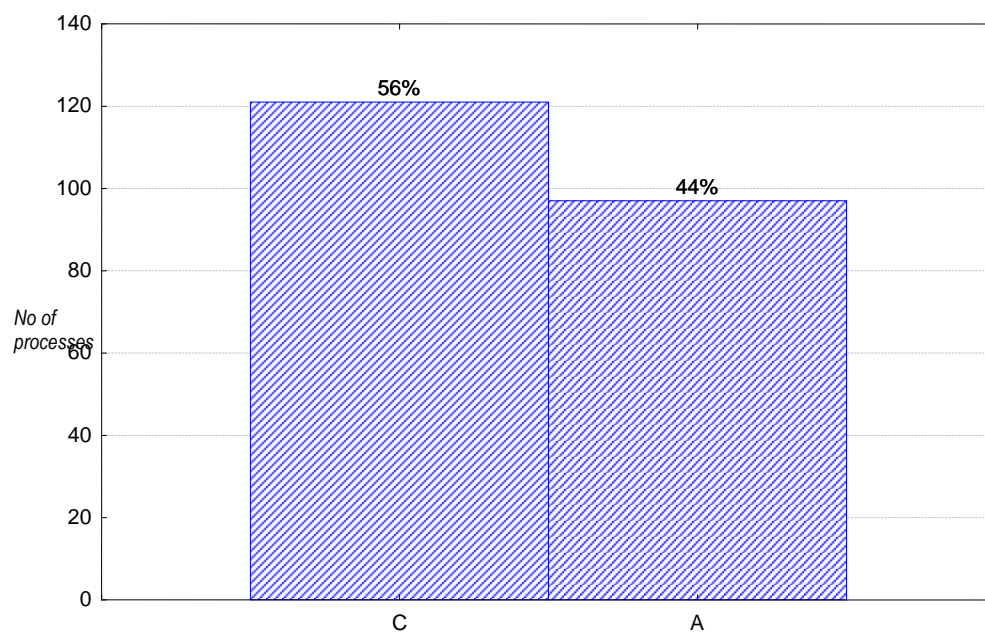


1 = above R7,501; 2 = R5,001 - R7,500; 3 = R2,501 - R5,000; 4 = up to R2,500

Figure 5.1c Wages per month

5.2.3 Referrals by process

Figure 5.1d below shows that 121 of the respondents had participated in conciliations (including conciliations under con-arb), representing 56% of the reported processes, and 97 had participated in arbitrations (including arbitrations under con-arb), representing 44% of the reported processes.



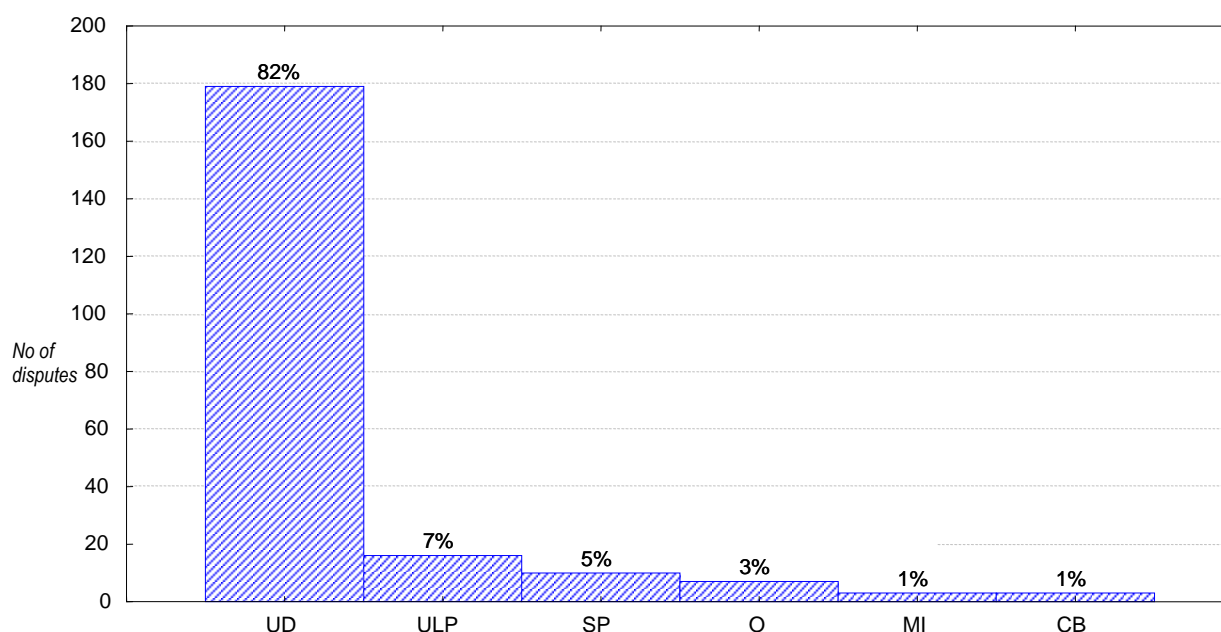
C = conciliation including conciliation under con-arb; A = arbitration including arbitration under con-arb

Figure 5.1d Referrals by process

5.2.4 Referrals by dispute

Figure 5.1e below breaks down referrals by dispute. Unfair dismissal disputes accounted for the largest percentage of disputes heard by the CCMA during the research period (179 of the total disputes heard), followed by unfair labour practices (16 of the total disputes heard).

This confirms the trends in the literature review.

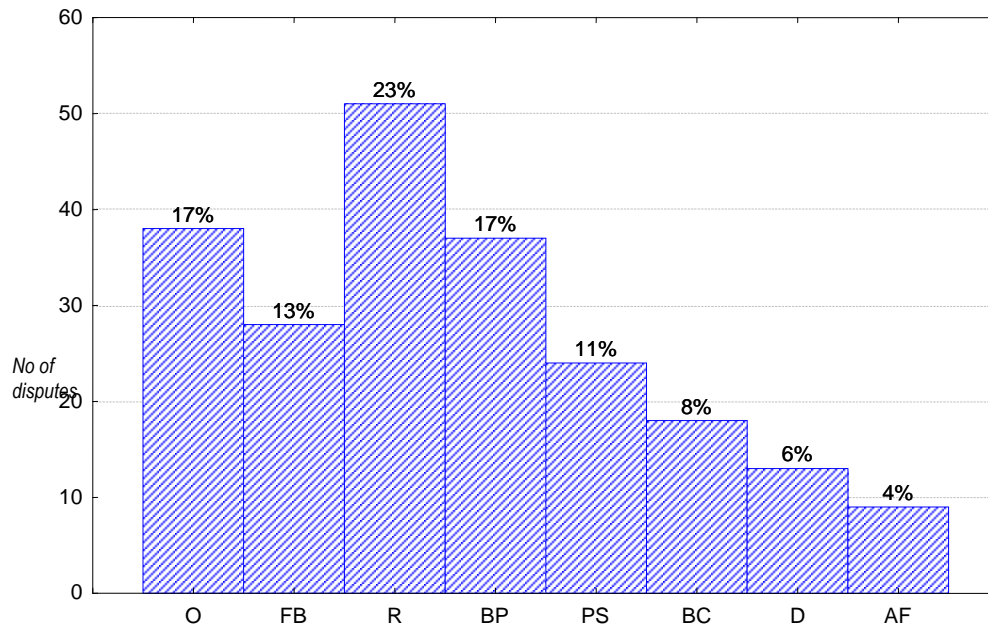


UD = unfair dismissal; ULP = unfair labour practice; SP = severance pay; O = other; MI = mutual interest; CB = collective bargaining

Figure 5.1e Referrals by dispute

5.2.5 Referrals by sector

The breakdown of referrals per sector conforms to the reported trends. Figure 5.1f indicates that the retail sector accounted for the highest number of disputes heard (51). Excluding the other sectors combined, the retail sector was followed by business and professional services (37 disputes heard), food and beverage (28 disputes) and private security (24 disputes).



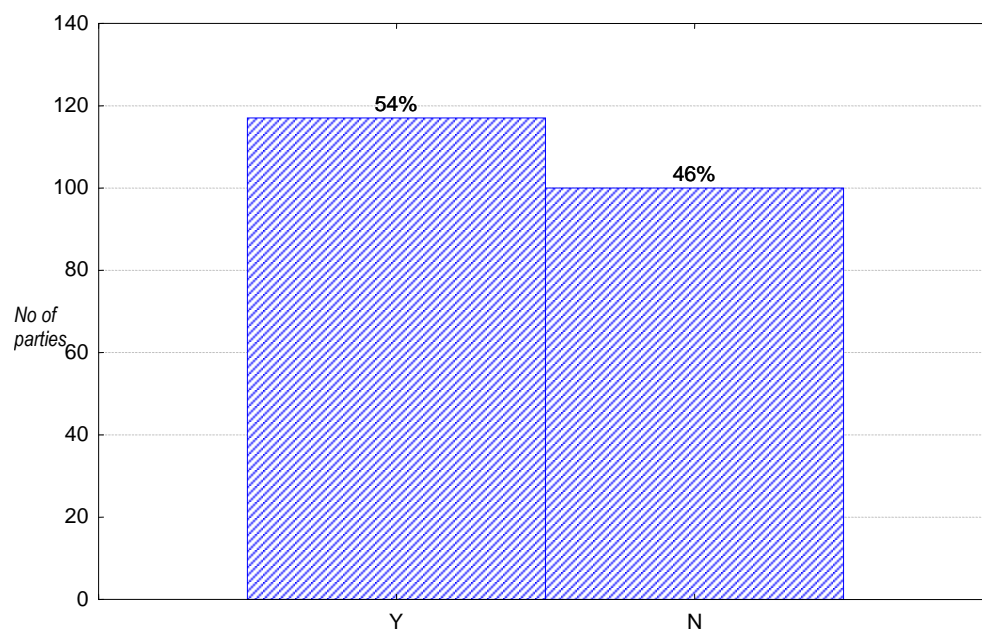
FB = food and beverage; R = retail; BP = business and professional services; BC = building and construction; PS = private security; D = domestic; AF = agricultural and farming; O = other

Figure 5.1f Referrals by sector

5.2.6 First or nth time at the CCMA

Figure 5.1g below shows that 117 of the respondents reported having been in conciliation at the CCMA in another dispute before: that is, nth timers, representing 54% of the conciliation respondents. A total of 100 respondents reported being in conciliation for the first time: that is, first timers, representing 46% of the conciliation respondents.

These findings can be explained by the high use of trade union and employers' organisation representation by parties to disputes. This is reflected later under 5.2.8.



Y = nth time; N = first time
Figure 5.1g First or nth time at the CCMA (Conciliations)

Figure 5.1h below shows that 49 respondents reported having been in arbitration at the CCMA in another dispute before: that is, nth timers, representing 53% of the arbitration respondents. Forty-three respondents reported being in arbitration for the first time: that is, first timers, representing 47% of the arbitration respondents.

As in relation to the conciliations, these findings can be explained by the high use of trade union and employers' organisation representation by parties to disputes. This is reflected later under 5.2.8.

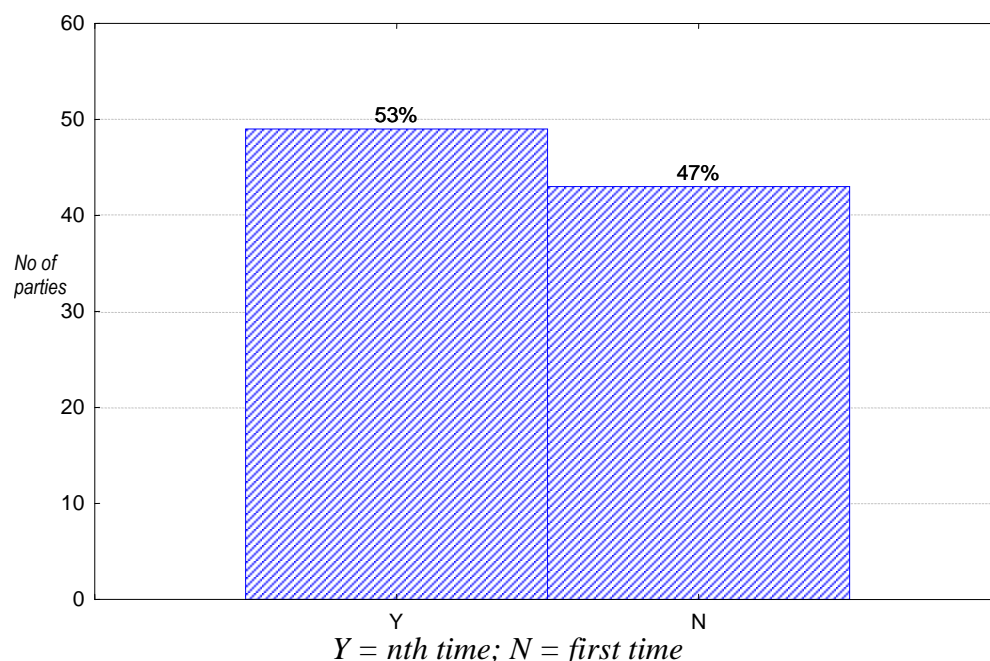
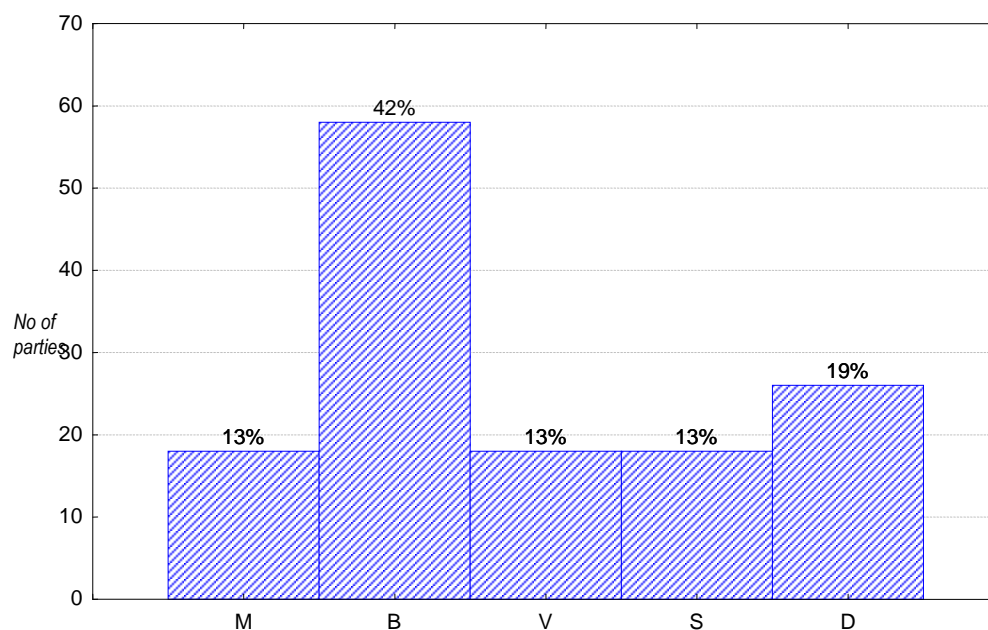


Figure 5.1h First or nth time at the CCMA (Arbitrations)

5.2.7 Size of employer

Small and medium businesses taken together (80 in total, representing 58%) constituted a majority of the employer respondents. Twenty-six were micro-business/domestic employers (19%), 18 were very small business employers (13%), 18 were small business employers (13%), 18 were medium business employers (13%) and 58 were big businesses (42%). Figure 5.1i below represents this information.

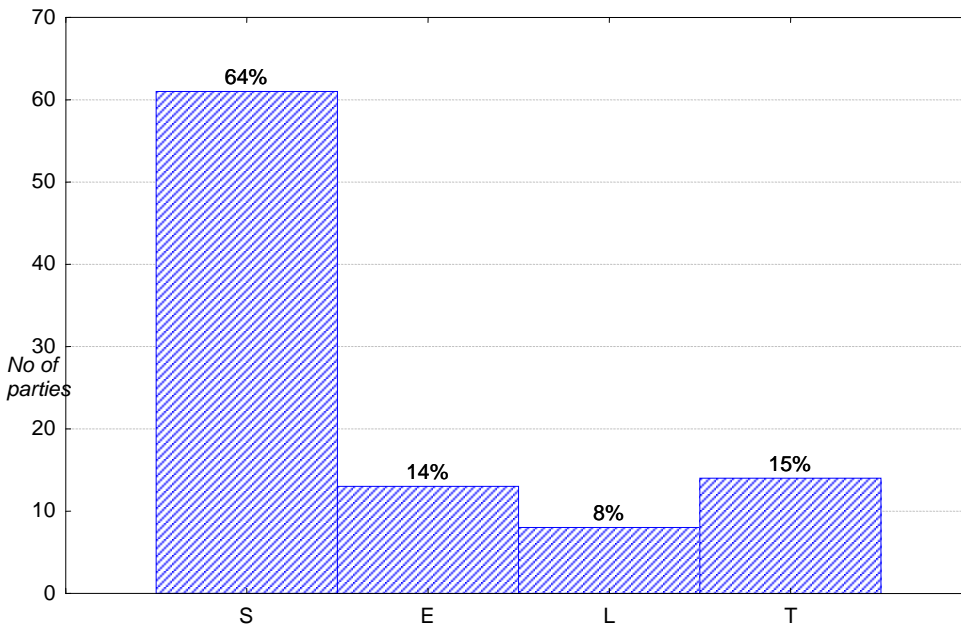


D = micro/domestic business; V = very small business; S = small business; M = medium business; B = big business

Figure 5.1i Size of employer

5.2.8 Representation at hearings

Of the respondents who participated in arbitrations, 82 (both employers and employees) did not request legal representation. Eleven parties requested legal representation, and of these nine were granted and three were not. A majority of parties (61 in count, being 29 employer parties and 32 employee parties) represented themselves; 13 employer parties used employers' organisations; 14 employee parties used trade union representation; and nine used legal representation. Figure 5.1j below represents this information.



S = self-representation; E = employers' organisation; L = legal representation; T = trade union representation

Figure 5.1j Type of representation used

5.2.9 Conclusion

The dominant characteristics of the sample can be summarised as follows:

- The sample comprised of employer/employers's organisation parties (52%) and employee/trade union parties (48%).
- The majority (59%) of the employees occupied positions below supervisory level. The majority (65% of employees had a matric or lower qualification. The majority (59%) of employees earned less than R5000 per month.
- The majority of participants (56%) had participated in conciliation.
- Unfair dismissal disputes accounted for 82% of the disputes heard by the CCMA during the research period.
- The retail sector accounted for the largest number (23%) of disputes heard by the CCMA during the research period.
- The majority of respondents (54%) have participated in conciliation at the CCMA before.
- Small and medium businesses taken together, constituted the majority (58%) of the employer respondents.

- The majority (64%) of parties (employer and employee) represented themselves at arbitration.

5.3 Efficiency

During the period from 1 April 2008 to 31 March 2009, the CCMA received a total of 140 366 disputes, an average of 555 referrals every working day and a 6% increase over the 2007/2008 financial year (CCMA, 2009). Of these 23% were deemed to be non-jurisdictional and screened out. Referral forms that were incomplete and cases that were referred to other organisations accounted for 34% and 23% of the total cases screened out respectively. Thirteen percent of the jurisdictional cases were dealt with by pre-conciliation at the point of entry. Of these, 48% were settled at the time of referral, which constituted 6% of the total jurisdictional cases received (CCMA, 2009).

The demand for CCMA services by region conformed to trends. Gauteng province (Johannesburg and Pretoria) had the largest caseload, at 40%, followed by KwaZulu-Natal at 15% and the Western Cape at 13%. The remaining regional offices each accounted for less than 10% of the national caseload (CCMA, 2009).

Conciliations accounted for 62% of the total events heard. A total of 101 759 conciliations were heard (including pre-conciliations and conciliations under con-arbs), an average of 402 every working day. This represented an increase of 12% over the previous year. Of the total conciliations heard, 45% were heard using the con-arb process. Of the total con-arbs heard, 83% were finalised in one day (CCMA, 2009). Non-attendance at conciliation accounted for 16% of the total conciliations scheduled. Non-attendance by the respondent, the applicant and both parties accounted for 58%, 23% and 19% of the total non-attendance respectively (CCMA, 2009).

A total of 40 229 arbitrations were heard, being 24% of the total events heard during the financial year under review. This represented a 5% increase over the previous year. A total of 24 433 awards were rendered (an average of 96 per working day), 5% more than the previous year. One percent of the total awards were late (rendered after 14 days from the conclusion of the

arbitration). Furthermore, 62% of the awards were in favour of the employee party and 38% were in favour of the employer party, which was fairly consistent with previous years (CCMA, 2009). Non-attendance at arbitration accounted for 21% of the total arbitrations scheduled. Non-attendance by the respondent, the applicant and both parties accounted for 45%, 37% and 18% of the total non-attendance respectively (CCMA, 2009).

In addition to the conciliations and arbitrations heard, a further 22 459 'other' processes were heard. This represented an increase of 5% over the previous year. Points in limine and rescissions accounted for 64% and 32% respectively of the total other processes heard. Some 69% of the total points in limine that were heard dealt with condonation, 74% of which were granted. Of the total rescissions heard, 70% were granted.

The average number of days from referral to the finalisation of conciliations was 28 days. The average number of days from arbitration referral to finalisation was 41 days. The national average settlement rate for the year was 67% (CCMA, 2009). All the research respondents stated that their conciliations and arbitrations had been concluded within the statutory 30-day and 60-day time limits respectively. More than three-quarters of the processes were finalised in one day, a majority of the remaining in two days and the remainder in three days.

5.4 Accessibility

The research distinguished between the informality of the process of referral and the informality of the actual dispute resolution process (namely conciliations and arbitrations). The analysis follows the same categorisation.

5.4.1 Informality of the actual referral process

Informality of the actual process of referral was measured using a four-point horizontal graphic rating scale, ranging from 'strongly disagree' to 'strongly agree'. The responses 'strongly disagree' to 'strongly agree' were interpreted using the integers 1 to 4 (1 = very formal, 2 = formal, 3 = informal; 4 = very informal). In terms of the informality of the actual process of referral, as experienced by all parties, the means per item range from 2.49 to 3.15, with standard

deviations ranging from 0.70 to 0.98. Over all the items the medians are 2 and 3. The lower quartile is 2 and the upper is 4. Table 5.1 below tabulates these results.

Table 5.1 Informality of process of referral: means per item

Variable	Valid N	Mean	Median	Minimum	Maximum	Lower Quartile	Upper Quartile	Std.Dev.
7 INF REF	107	3.000	3.0	1.0	4.0	2.0	4.0	0.98
8 INF REF	107	3.159	3.0	1.0	4.0	3.0	4.0	0.70
9 INF REF	107	2.607	2.0	1.0	4.0	2.0	3.0	0.95
10 INF REF	107	2.495	2.0	1.0	4.0	2.0	3.0	0.97
11 INF REF	107	2.869	3.0	1.0	4.0	2.0	4.0	0.99

INF REF = informality of the process of referral. The number is the question/statement number in the questionnaire

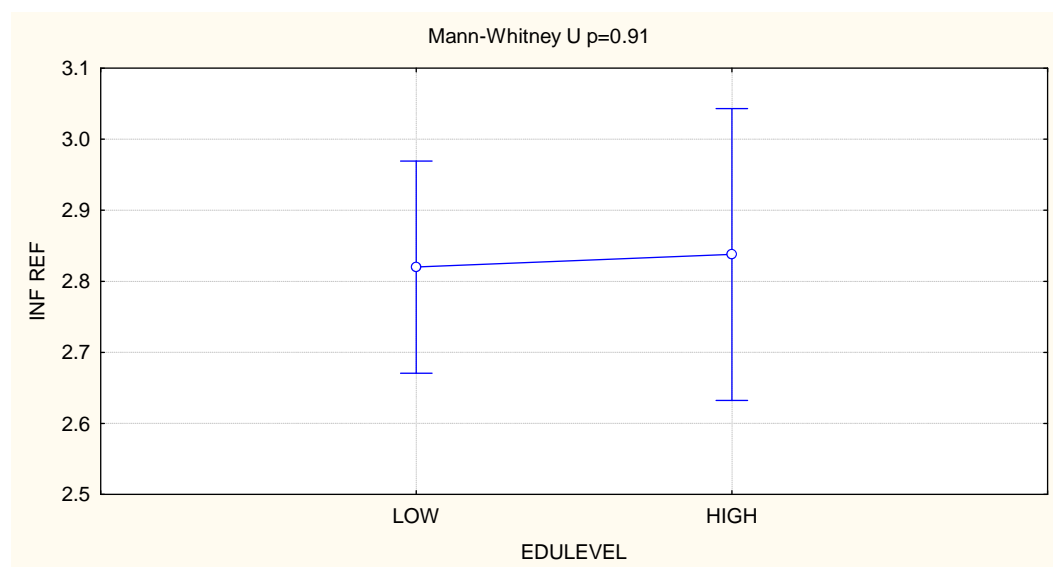
The overall mean is 2.82, with a standard deviation of 0.62, a standard error of the mean of 0.06, and the 95% confidence interval is [2.70, 2.94]. Table 5.2 below tabulates these results.

Table 5.2 Informality of process of referral: low- and high-education parties

Effect	Level of Factor	N	INF REF Mean	INF REF Std.Dev.	INF REF Std.Err	INF REF -95.00%	INF REF +95.00%
Total		107	2.826168	0.627113	0.060625	2.705973	2.946364
EDULEVEL	LOW	70	2.820000	0.669111	0.079974	2.660456	2.979544
EDULEVEL	HIGH	37	2.837838	0.547393	0.089991	2.655328	3.020348

EDULEVEL = level of education. LOW = matric and below; HIGH = diploma and above

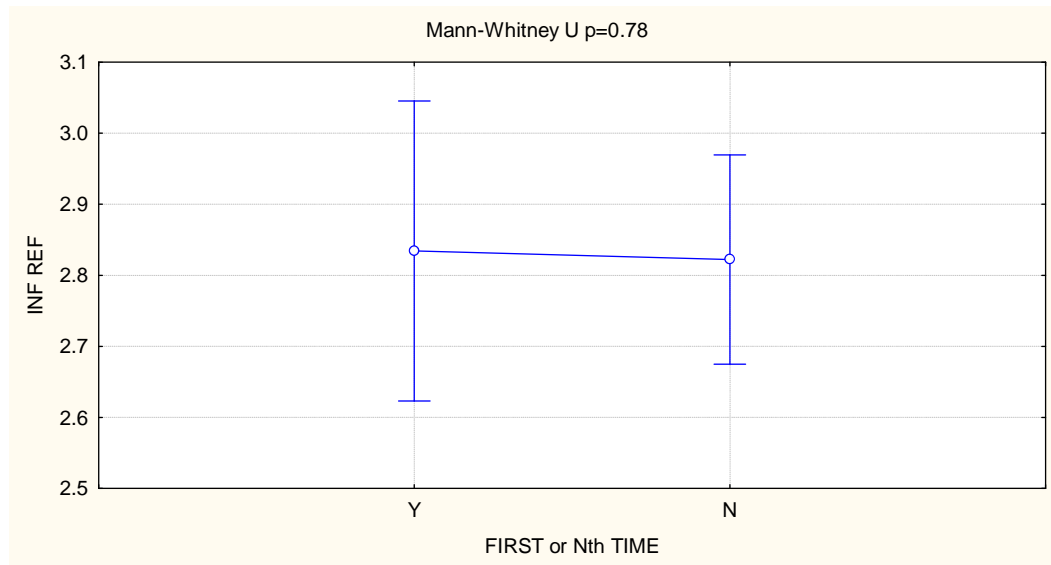
There is no significant difference between low-education employee parties (matric and below matric) and high education employee parties (diploma and higher). As indicated in Table 5.2 above, the mean is 2.82 for low-education employee parties, with a standard deviation of 0.66, a standard error of the mean of 0.07, and a 95% confidence interval of [2.66, 2.97]. For high-education parties the mean is 2.83, with a standard deviation of 0.54, a standard error of the mean of 0.08 and a 95% confidence interval of [2.65, 3.02]. As shown in Figure 5.2 below, the Mann Whitney U statistic is $0.91 > p > 0.05$, which accepts the null hypothesis that there is no significant difference between these two groups. The graphical comparison shows a great amount of overlap between the means of the two groups.



INF REF = informality of the process of referral. *EDULEVEL* = education level where *LOW* = matric and below; *HIGH* = diploma and above

Figure 5.2 Informality of process of referral: low- and high-education parties

Equally, there is no significant difference between first timers to the CCMA and parties who have referred a dispute to the CCMA before. As illustrated in Figure 5.3 below, the Mann Whitney U statistic is $0.78 > p > 0.05$ which accepts the significance null hypothesis that there is no significant difference between first timers to the CCMA and parties who have referred a dispute to the CCMA before. The graphical comparison, which represents the descriptive statistics in Table 5.3 below, shows a fair amount of overlap between the two groups. The overall mean is 2.82 for both groups, with a standard deviation of 0.62, a standard error of the mean of 0.06 and a 95% confidence interval of [2.70, 2.94]. The mean for first timers is 2.82, with a standard deviation of 0.66, a standard error of the mean of 0.07 and a 95% confidence interval of [2.66, 2.97]. The mean for parties who have been at the CCMA before is 2.83, with a standard deviation of 0.53 and a standard error of the mean of 0.09. The 95% confidence interval is [2.64, 3.01].



INF REF = informality of the process of referral; *Y* = nth time: the party has referred a dispute to the CCMA before; *N* = first time: the party has never referred a dispute to CCMA before

Figure 5.3 Informality of process of referral: first timers and nth timers

Table 5.3 Informality of process of referral: first timers and nth timers

Effect	Level of Factor	N	INF REF Mean	INF REF Std.Dev.	INF REF Std.Err	INF REF -95.00%	INF REF +95.00%
Total		107	2.826168	0.627113	0.060625	2.705973	2.946364
31 CON nth	Y	35	2.834286	0.539031	0.091113	2.649122	3.019449
31 CON nth	N	72	2.822222	0.669291	0.078877	2.664947	2.979498

31 CON nth = *FIRST or Nth TIME*: *Y* and *N* are as explained above. The number (31) is the question/statement number in the questionnaire

5.4.2 Informality of the process of dispute resolution

Informality of the process of dispute resolution was measured using a four-point horizontal graphic rating scale, ranging from 'strongly disagree' to 'strongly agree'. The responses 'strongly disagree' to 'strongly agree' were interpreted using the integers 1 to 4 (1 = very formal, 2 = formal, 3 = informal; 4 = very informal).

The data was analysed firstly in terms of the overall informality of conciliations and arbitrations as experienced by all the parties, and then as experienced by groups: employee versus employer parties; first timers versus parties who have used the CCMA before; and low- versus high-education parties.

5.4.2.1 Conciliations

In terms of the informality of the actual conciliation as experienced by all parties, the means per item range from 2.67 to 3.36, with standard deviations ranging from 0.66 to 0.98. Over all the items, the medians are 3. The lower quartile is 2s and 3s and the upper is 4s. Table 5.4 below tabulates these results.

Table 5.4 Informality of conciliations: means per item

Variable	Valid N	Mean	Median	Minimum	Maximum	Lower Quartile	Upper Quartile	Std.Dev.
25 INF CON	216	3.264	3.0	1.0	4.0	3.0	4.0	0.741
26 INF CON	218	2.674	3.0	1.0	4.0	2.0	3.0	0.983
27 INF CON	217	3.369	3.0	1.0	4.0	3.0	4.0	0.668
28 INF CON	217	3.272	3.0	1.0	4.0	3.0	4.0	0.754
29 INF CON	216	3.259	3.0	1.0	4.0	3.0	4.0	0.745
30 INF CON	215	2.837	3.0	1.0	4.0	2.0	4.0	0.884

INF CON = informality of the actual process of conciliation. The number is the question/statement number in the questionnaire

The overall mean for the informality of conciliations is 3.11, with a standard deviation of 0.59, a standard error of the mean of 0.04 and a 95% confidence interval of [3.03, 3.19]. Table 5.4a below tabulates these results.

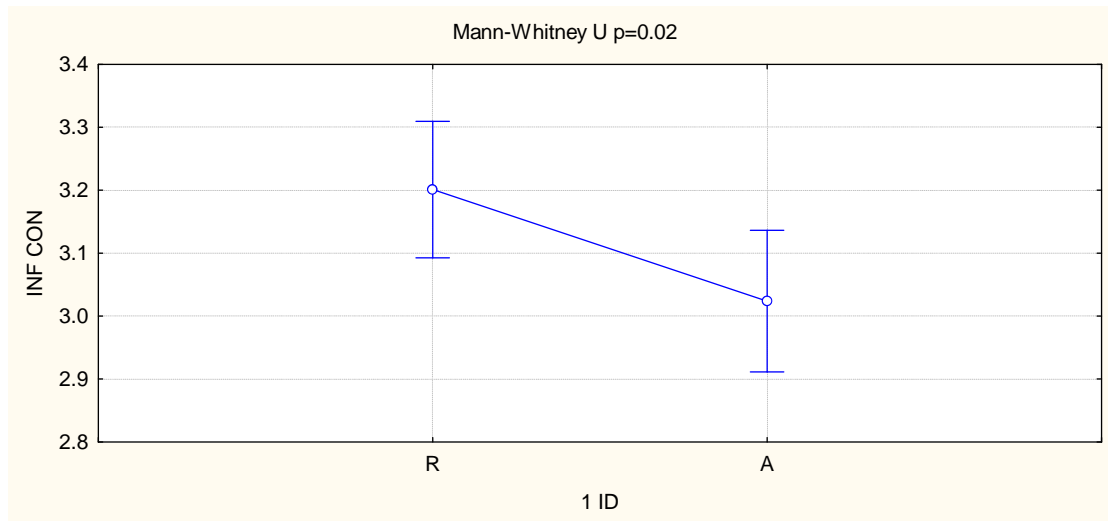
Table 5.4a Informality of conciliations: employer and employee parties

Effect	Level of Factor	N	INF CON Mean	INF CON Std.Dev.	INF CON Std.Err	INF CON -95.00%	INF CON +95.00%
Total		218	3.115749	0.590618	0.040002	3.036908	3.194591
1 ID	R	113	3.201180	0.547939	0.051546	3.099049	3.303311
1 ID	A	105	3.023810	0.622936	0.060792	2.903256	3.144363

ID = identity of party completing the questionnaire (*I* = item number in questionnaire); *R* = employer/employers' organisation party; *A* = employee/trade union party

As between employer and employee parties, there is significant difference in perceptions of the informality of conciliations. As shown in Table 5.4a above, the mean for employer parties is 3.20, with a standard deviation of 0.54, a standard error of the mean of 0.05 and a 95% confidence interval of [3.09, 3.30], whereas the mean for employee parties is 3.02, with a standard deviation of 0.62, a standard error of the mean of 0.06 and a 95% confidence interval of [2.90, 3.14]. As shown in Figure 5.4 below, the Mann Whitney U statistic is $0.02 < p < 0.05$ which

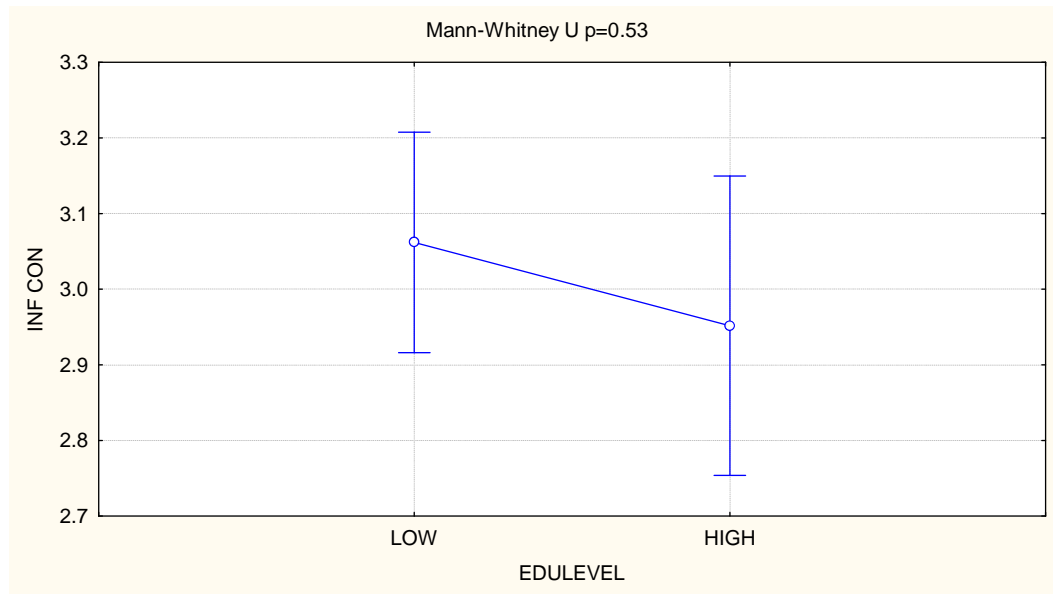
rejects the null hypothesis that there is no significant difference between employers and employees in their perceptions of the informality of conciliations. The graphical comparison shows no overlap between the two groups. While both employer and employee parties indicate informality, employee parties perceive more formality, whereas employer parties perceive more informality.



INF CON = informality of the actual process of conciliation; *ID* = identity of party completing the questionnaire (*I* = item number in questionnaire): *R* = employer/employers' organisation party; *A* = employee/trade union party

Figure 5.4 Informality of conciliations: employer and employee parties

There is no significant difference between low-education employee parties (matric and below matric) and high-education parties (diploma, degree and higher) in their perceptions of the informality of conciliations. As illustrated in Figure 5.5 below, the Mann Whitney U statistic is $0.53 > p > 0.05$ which supports the null hypothesis that there is no significant difference between low- and high-education parties in their perception of the informality of conciliations. The graph also shows some overlap between both distributions. As Table 5.5 below shows, the mean for all employees is 3.02, with a standard deviation of 0.61, a standard error of the mean of 0.05 and a 95% confidence interval of [2.90, 3.14]. The mean for low-education parties is 3.06, with a standard deviation of 0.64, a standard error of the mean of 0.07 and a 95% confidence interval of [2.90, 3.21]. The mean for high-education employee parties is 2.95, with a standard deviation of 0.55, a standard error of the mean of 0.08 and a 95% confidence interval of [2.77, 3.13].



INF CON = informality of the actual process of conciliation. *EDULEVEL* = education level where *LOW* = matric and below; *HIGH* = diploma and above.

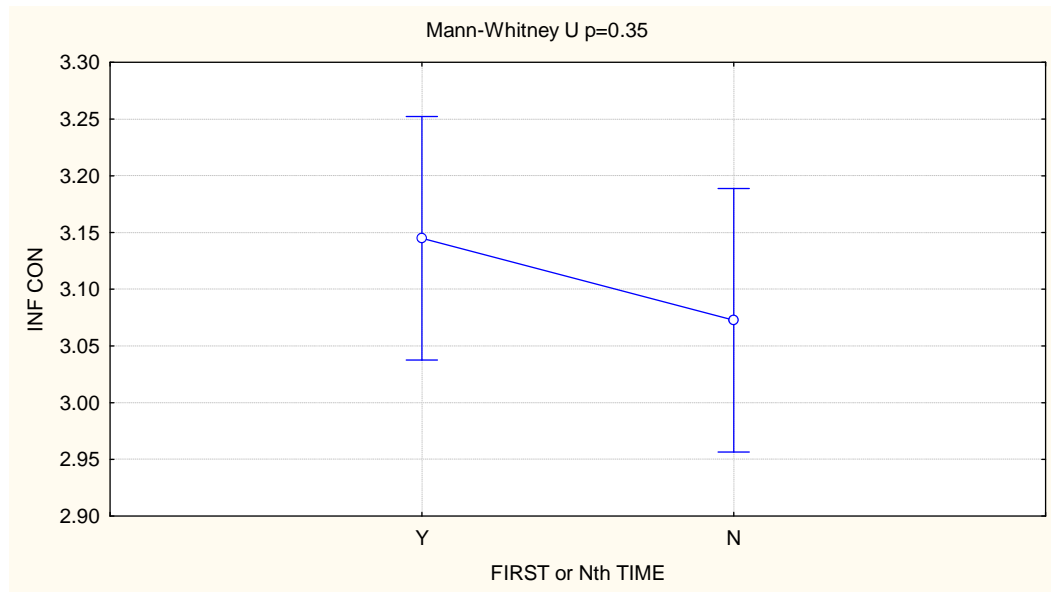
Figure 5.5 Informality of conciliations: low- and high-education parties

Table 5.5 Informality of conciliations: low- and high-education parties

Effect	Level of Factor	N	INF CON	INF CON	INF CON	INF CON	INF CON
			Mean	Std.Dev.	Std.Err	-95.00%	+95.00%
Total		108	3.023148	0.614576	0.059138	2.905915	3.140382
EDULEVEL	LOW	70	3.061905	0.646539	0.077276	2.907743	3.216066
EDULEVEL	HIGH	38	2.951754	0.551966	0.089541	2.770328	3.133181

EDULEVEL = Education level, where *LOW* = matric and below; *HIGH* = diploma and above

There also is no significant difference between employee first timers and parties who have been to the CCMA before in their perceptions of the informality of conciliations. The Mann Whitney U statistic (Figure 5.6 below) $0.35 > p > 0.05$ attests that there is no significant difference between these two groups. The graph also depicts a fair amount of overlap between first timers and parties who have been to the CCMA in another dispute.



INF CON = informality of the actual process of conciliation; Y = nth time: the party has been to conciliation in another dispute at the CCMA before; N = first time: the party has never been to conciliation in another dispute at the CCMA before

Figure 5.6 Informality of conciliations: first and nth timers

As shown in Table 5.6 below, the mean for all employee parties is 3.11, with a standard deviation of 0.58, a standard error of the mean of 0.03 and a 95% confidence interval of [3.03, 3.19]. The mean for first timers is 3.07, with a standard deviation of 0.59, a standard error of the mean of 0.05 and a 95% confidence interval of [2.95, 3.19], whereas the mean for parties who have been to the CCMA in another conciliation before is 3.14, with a standard deviation of 0.58, a standard error of the mean of 0.05 and a 95% confidence interval of [3.03, 3.25].

Table 5.6 Informality of conciliations: first and nth timers

Effect	Descriptive Statistics (DATA in DATA CCMA 20091001.stw)						
	Level of Factor	N	INF CON Mean	INF CON Std.Dev.	INF CON Std.Err	INF CON -95.00%	INF CON +95.00%
Total		217	3.111674	0.588904	0.039977	3.032879	3.190470
31 CON nth	Y	117	3.145014	0.581455	0.053756	3.038545	3.251484
31 CON nth	N	100	3.072667	0.598059	0.059806	2.953999	3.191334

31 CON nth = FIRST OR Nth TIME, where Y and N are as explained above; The number (31) is the question/statement number in the questionnaire.

5.4.2.2 Arbitrations

In terms of the informality of the actual arbitration, as experienced by all the parties, the means per item range from 2.53 to 3.21, with standard deviations ranging from 0.63 to 0.95. Over all the items the medians are 3. The lower quartile is 2s and 3s and the upper is 3s and 4s. Table 5.7 below tabulates these results.

Table 5.7 Informality of arbitrations: means per item

Variable	Valid N	Mean	Median	Minimum	Maximum	Lower Quartile	Upper Quartile	Std.Dev.
51 INF ARB	97	3.113	3.0	1.0	4.0	3.0	4.0	0.789
52 INF ARB	96	3.146	3.0	1.0	4.0	3.0	4.0	0.696
53 INF ARB	96	3.063	3.0	1.0	4.0	3.0	4.0	0.779
54 INF ARB	97	2.536	2.0	1.0	4.0	2.0	3.0	0.936
55 INF ARB	97	3.216	3.0	1.0	4.0	3.0	4.0	0.633
56 INF ARB	97	3.155	3.0	1.0	4.0	3.0	4.0	0.741
57 INF ARB	97	2.918	3.0	1.0	4.0	2.0	4.0	0.862
58 INF ARB	96	2.646	3.0	1.0	4.0	2.0	3.0	0.951

INF ARB = informality of arbitration. The number is the question/statement number in the questionnaire

The overall mean for the informality of arbitrations is 2.97, with a standard deviation of 0.64, a standard error of the mean of 0.06 and a 95% confidence interval of [2.84, 3.10]. Table 5.7a below shows these results.

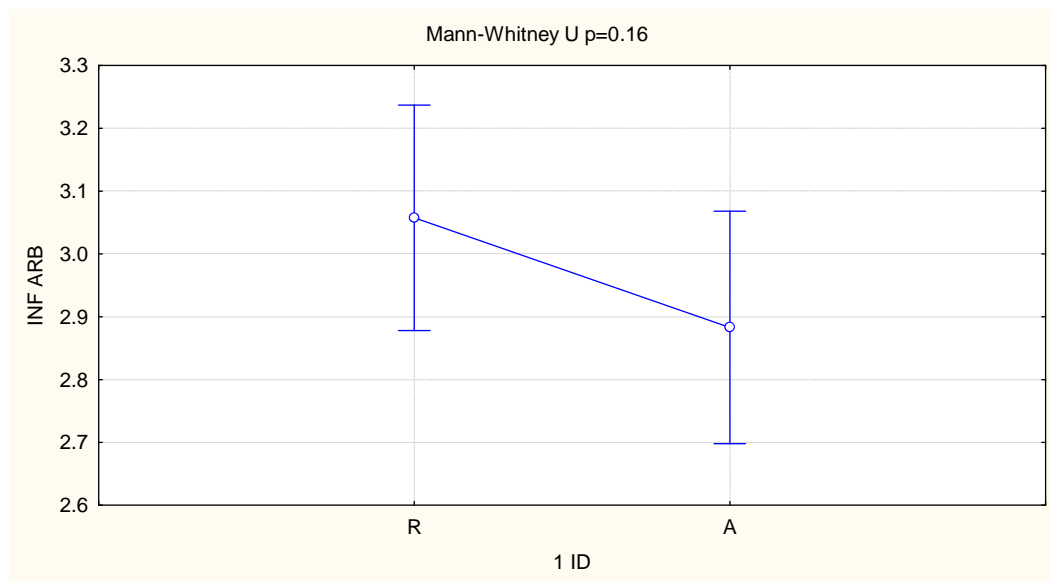
Table 5.7a Informality of arbitrations as between employers and employees

Effect	Level of Factor	N	INF ARB Mean	INF ARB Std.Dev.	INF ARB Std.Err	INF ARB -95.00%	INF ARB +95.00%
Total		97	2.972938	0.642041	0.065189	2.843538	3.102338
1 ID	R	50	3.057500	0.618750	0.087505	2.881653	3.233347
1 ID	A	47	2.882979	0.660618	0.096361	2.689014	3.076943

ID = identity of party completing the questionnaire (1 = item number in questionnaire): R = employer/employers' organisation party; A = employee/trade union party

As between employer parties and employee parties, there is no significant difference in perceptions of the informality of arbitrations. According to Table 5.7a above, the mean for employer parties is 3.05, with a standard deviation of 0.61, a standard error of the mean of 0.08 and a 95% confidence interval of [2.88, 3.23]. The mean for employee parties is 2.88, with a

standard deviation of 0.66, a standard error of the mean of 0.09 and a 95% confidence interval of [2.68, 3.07]. Figure 5.7 below represents this finding. The Mann Whitney U statistic of $0.16 > p > 0.05$ accepts the null hypothesis that there is no significant difference between employer and employee parties in their perceived informality of the arbitrations. However, although both the employer and employee parties consider arbitrations informal, the employee parties tend to perceive slightly more formality, whereas employer parties tend to perceive slightly more informality.



INF ARB = informality of arbitration. *ID* = identity of party completing the questionnaire (*I* = item number in questionnaire): *R* = employer/employers' organisation party; *A* = employee/trade union party

Figure 5.7 Informality of arbitrations: employers and employees

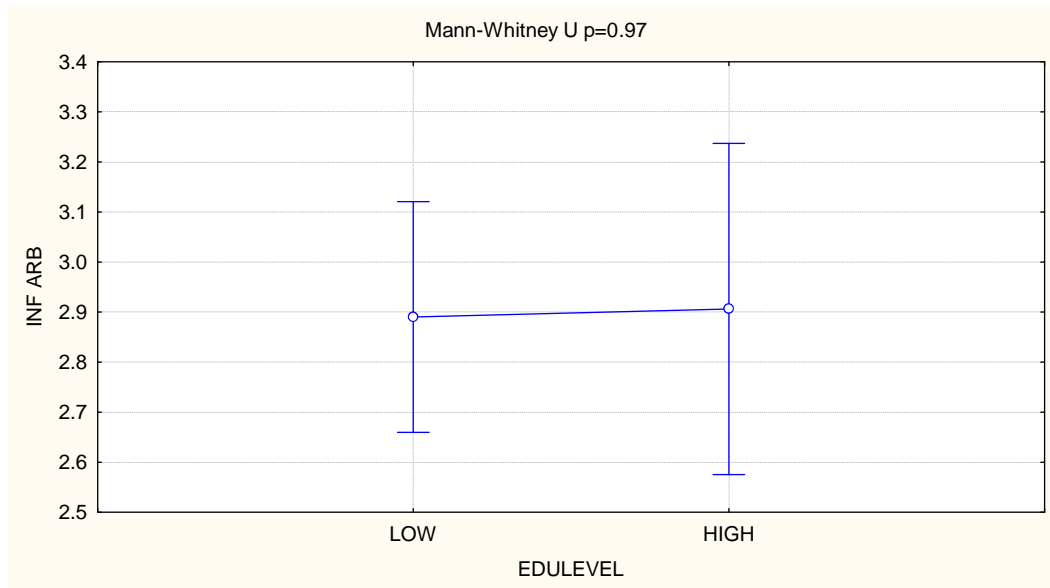
There also is no significant difference between low-education employee parties (matric and below matric) and high-education employee parties (diploma and higher) in their perceptions of the informality of arbitrations. As shown in Table 5.8 below, the mean for all employee parties is 2.89, with a standard deviation of 0.65, a standard error of the mean of 0.09 and a 95% confidence interval of [2.70, 3.08]. The mean for low-education parties is 2.89, with a standard deviation of 0.60, a standard error of the mean of 0.10 and a 95% confidence interval of [2.67, 3.10]. The mean for high-education employee parties is 2.90, with a standard deviation of 0.76 and a standard error of the mean of the mean of 0.19. The 95% confidence interval is [2.49, 3.31].

Table 5.8 Informality of arbitrations: low- and high-education parties

Effect	Level of Factor	N	INF ARB Mean	INF ARB Std.Dev.	INF ARB Std.Err	INF ARB -95.00%	INF ARB +95.00%
Total		49	2.895408	0.650694	0.092956	2.708507	3.082309
EDULEVEL	LOW	33	2.890152	0.601721	0.104746	2.676791	3.103512
EDULEVEL	HIGH	16	2.906250	0.763080	0.190770	2.499633	3.312867

EDULEVEL = education level; LOW = matric and below; HIGH = diploma and above

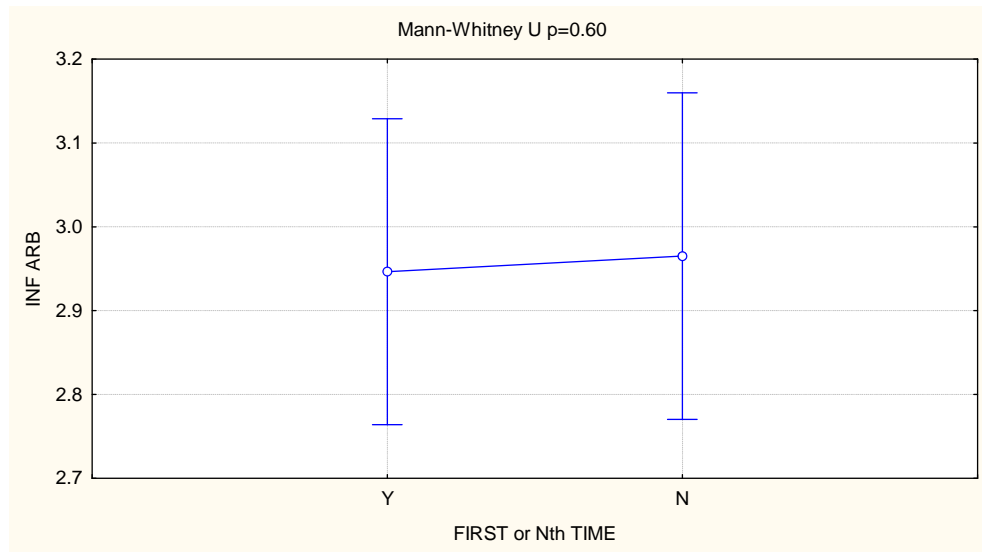
As shown in Figure 5.8 below, the Mann Whitney U statistic is $0.97 > p > 0.05$ which supports the null hypothesis that there is no significant difference between the two groups. The graphical comparison also shows a large overlap between the two groups. If the p-value were lower than 0.05, there would be no overlap between the two distributions.



INF ARB = informality of arbitration; EDULEVEL = education level, where LOW = matric and below; HIGH = diploma and above

Figure 5.8 Informality of arbitrations: low- and high-education parties

There is also no significant difference between first timers and parties who have been to the CCMA before in their perceptions of the informality of arbitrations. The Mann Whitney U statistic is $0.60 > p > 0.05$, which accepts the null hypothesis that there is no significant difference between first timers and parties who have been to the CCMA before in another dispute. The graphical comparison shows a great amount of overlap between the two groups. If the p-value were lower than 0.05, there would be no such overlap (see Figure 5.9 below).



INF ARB = informality of arbitration; Y = nth time: the party has been to arbitration in another dispute at the CCMA before; N = first time: the party has never been to arbitration in another dispute at the CCMA before

Figure 5.9 Informality of arbitrations: first and nth timers

As shown in Table 5.9 below, the mean for all employees is 2.95, with a standard deviation of 0.63, a standard error of the mean of 0.06 and a 95% confidence interval of [2.82, 3.08]. The mean for first timers is 2.96, with a standard deviation of 0.67, a standard error of the mean of 0.10 and a 95% confidence interval of [2.75, 3.17]. The mean for parties who have been to arbitration before is 2.94, with a standard deviation of 0.61, a standard error of the mean of 0.08 and a 95% confidence interval of [2.76, 3.12].

Table 5.9 Informality of arbitrations: first and nth timers

	Level of Factor	N	INF ARB Mean	INF ARB Std. Dev.	INF ARB Std. Err	INF ARB -95.00%	INF ARB +95.00%
Total		92	2.955163	0.639444	0.066667	2.822738	3.087588
65 ARB nth	Y	49	2.946429	0.616664	0.088095	2.769302	3.123555
65 ARB nth	N	43	2.965116	0.671666	0.102428	2.758408	3.171825

65 ARB nth = FIRST or Nth TIME, arbitrations where Y and N are as explained above. The number (65) is the question/statement number in the questionnaire

5.5 Quality of dispute resolution

Just as in relation to informality, the quality of dispute resolution was measured using a four-point horizontal graphic rating scale, ranging from 'strongly disagree' to 'strongly agree' through

statements. The responses ‘strongly disagree’ to ‘strongly agree’ were interpreted using integers 1 to 4 (1 = very poor, 2 = poor, 3 = good, 4 = very good). The data was analysed firstly in terms of the overall quality of conciliations and arbitrations, as experienced by all the parties, and then as experienced by groups: employee versus employer parties; first timers versus parties who have used the CCMA before; and low- versus high-education parties.

5.5.1 Conciliations

As shown in Table 5.10 below, in conciliations as experienced by all the parties, in terms of quality of dispute resolution, the means per item range from 3.27 to 3.50 with standard deviations ranging from 0.52 to 0.74. Over all the items, the medians are 3 and 4. The lower quartile is 3 and the upper quartile is 4. Table 5.10a below shows that the overall mean for the quality of conciliations is 3.38, with a standard deviation of 0.46, a standard error of the mean of 0.03 and a 95% confidence interval of [3.32, 3.45].

Table 5.10 Quality of conciliations: means per item

Variable	Valid N	Mean	Median	Minimum	Maximum	Lower Quartile	Upper Quartile	Std.Dev.
13 QLTY CON	218	3.500	4.0	2.0	4.0	3.0	4.0	0.528
14 QLTY CON	218	3.422	3.0	1.0	4.0	3.0	4.0	0.596
15 QLTY CON	217	3.378	3.0	1.0	4.0	3.0	4.0	0.635
16 QLTY CON	218	3.422	3.0	1.0	4.0	3.0	4.0	0.612
17 QLTY CON	218	3.376	3.5	1.0	4.0	3.0	4.0	0.735
18 QLTY CON	216	3.310	3.0	2.0	4.0	3.0	4.0	0.595
19 QLTY CON	217	3.341	3.0	1.0	4.0	3.0	4.0	0.580
20 QLTY CON	216	3.375	3.0	1.0	4.0	3.0	4.0	0.612
21 QLTY CON	216	3.403	4.0	1.0	4.0	3.0	4.0	0.741
22 QLTY CON	214	3.383	3.0	1.0	4.0	3.0	4.0	0.576
23 QLTY CON	144	3.278	3.0	1.0	4.0	3.0	4.0	0.631
24 QLTY CON	213	3.427	3.0	2.0	4.0	3.0	4.0	0.599

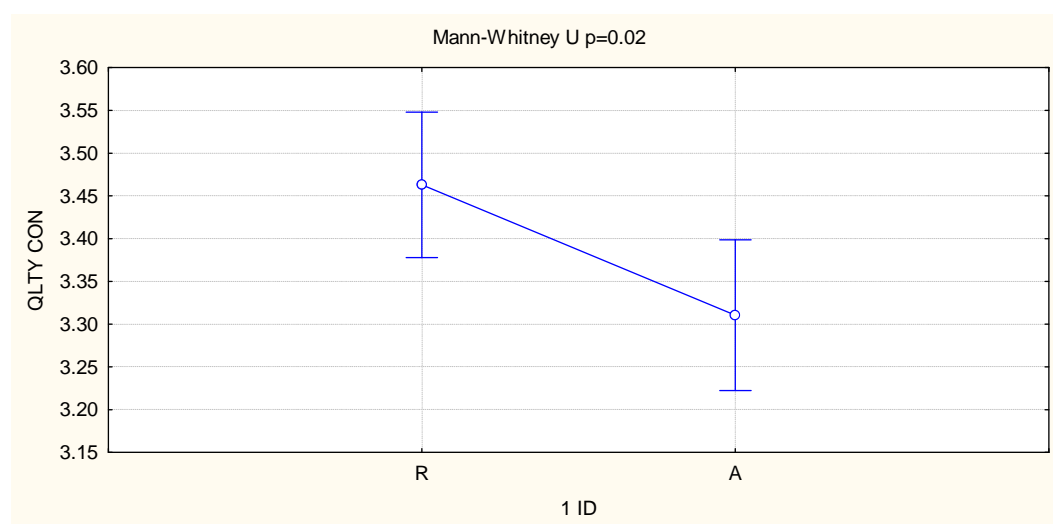
QLTY CON = quality of conciliation. The number is the question/statement number in the questionnaire

Table 5.10a Quality of conciliations: employers and employees

Effect	Level of Factor	N	QLTY CON Mean	QLTY CON Std.Dev.	QLTY CON Std.Err	QLTY CON -95.00%	QLTY CON +95.00%
Total		218	3.389577	0.463458	0.031389	3.327710	3.451444
1 ID	R	113	3.462957	0.440018	0.041393	3.380941	3.544973
1 ID	A	105	3.310606	0.476989	0.046549	3.218297	3.402915

ID = identity of party completing the questionnaire (1 = item number in questionnaire): R = employer/employers' organisation party; A = employee/trade union party

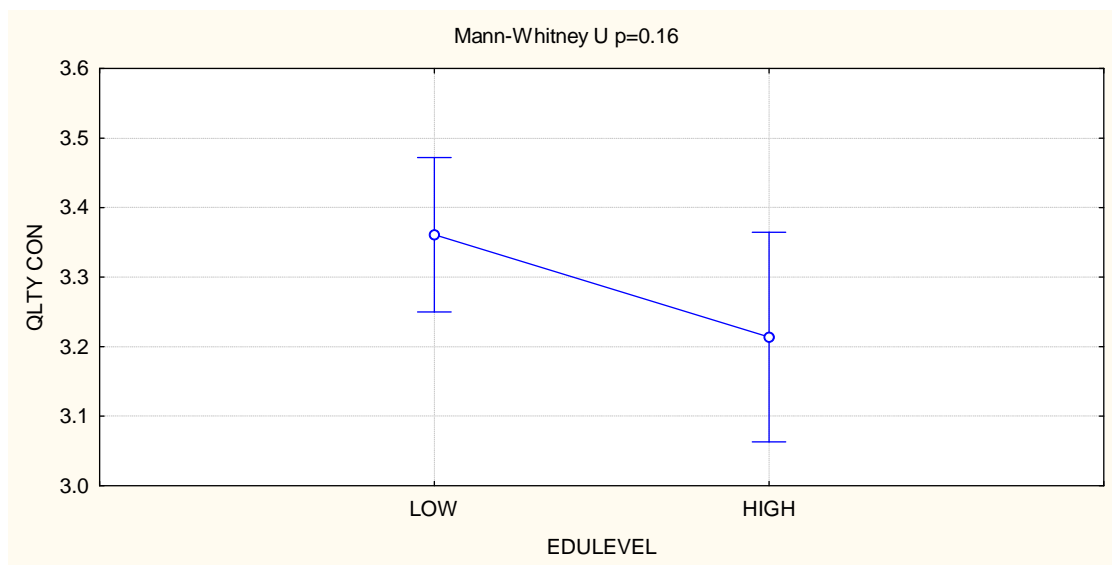
There is significant difference between the employer and employee parties in their perceptions of the quality of conciliations. As shown in Table 5.10a above, the mean for employer parties is 3.46, with a standard deviation of 0.44, a standard error of the mean of 0.04 and a 95% confidence interval of [3.38, 3.54]. The mean for employee parties is 3.31, with a standard deviation of 0.47, a standard error of the mean of 0.04 and a 95% confidence interval of [3.21, 3.40]. The Mann Whitney U statistic of $0.02 < p < 0.05$ rejects the null hypothesis that there is no significant difference between employer and employee parties in their perceived quality of conciliations. The graphical comparison (Figure 5.10 below) shows no overlap between the two groups. True to the low p-value and the absence of overlap between the mean, the evaluations by the employer parties are more positive while those of employee parties are more negative.



QLTY CON = quality of conciliation. ID = identity of party completing the questionnaire (1 = item number in questionnaire): R = employer/employers' organisation party; A = employee/trade union party

Figure 5.10 Quality of conciliations: employers and employees

There is no significant difference between low- and high-education employee parties in their perceptions of the quality of conciliations. As shown in Figure 5.11 below, the Mann Whitney U statistic of $0.16 > p > 0.05$ accepts the null hypothesis that there is no significant difference between low- and high-education parties. The graphical comparison also shows some overlap between the two groups. However, high-education parties are more negative, while the evaluations of low-education parties are more positive. As reflected in Table 5.11 below, the overall mean for both groups is 3.30, with a standard deviation of 0.47, a standard error of the mean of 0.04 and a 95% confidence interval of [3.21, 3.39]. The mean for low-education parties is 3.36, with a standard deviation of 0.46, a standard error of the mean of 0.05 and a 95% confidence interval of [3.24, 3.47]. The mean for high-education employee parties is 3.21, with a standard deviation of 0.47, a standard error of the mean of 0.07 and a 95% confidence interval of [3.05, 3.36].



QLTY CON = quality of conciliation; *EDULEVEL* = education level, where *LOW* = matric and below; *HIGH* = diploma and above

Figure 5.11 Quality of conciliations: low- and high-education parties

Table 5.11 Quality of conciliations: low- and high-education parties

Effect							
	Level of Factor	N	QLTY CON Mean	QLTY CON Std.Dev.	QLTY CON Std.Err	QLTY CON -95.00%	QLTY CON +95.00%
Total		108	3.309343	0.471794	0.045398	3.219346	3.399340
EDULEVEL	LOW	70	3.361147	0.466612	0.055771	3.249887	3.472407
EDULEVEL	HIGH	38	3.213915	0.472487	0.076648	3.058613	3.369218

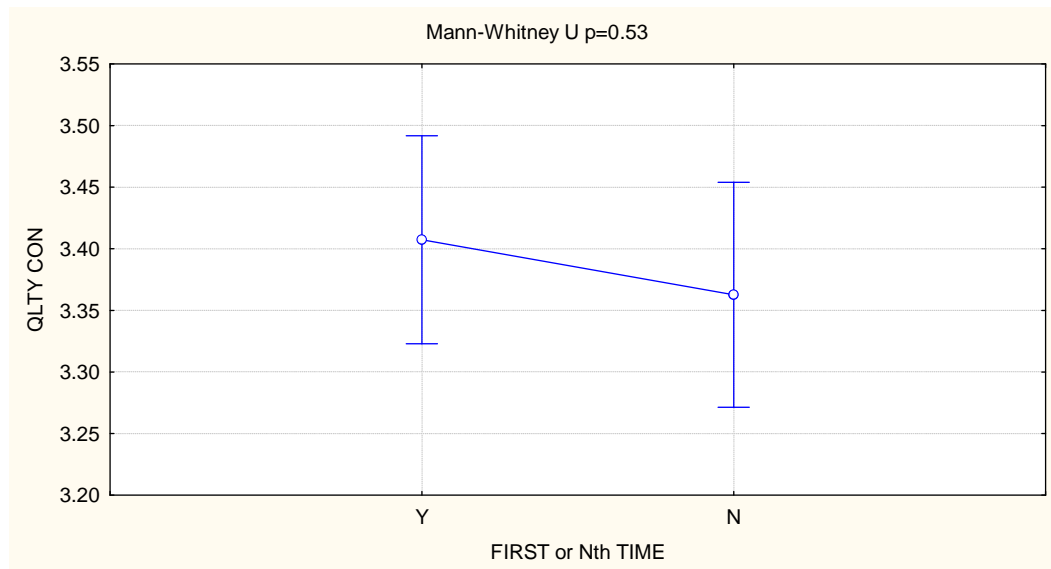
EDULEVEL = education level, where *LOW* = matric and below; *HIGH* = diploma and above

There also is no significant difference between first timers and parties who have been to the CCMA before in their perceptions of the quality of conciliations. As reflected in Table 5.12 below, the mean for all parties is 3.38, with a standard deviation of 0.46, a standard error of the mean of 0.03 and a 95% confidence interval of [3.32, 3.44]. The mean for first timers is 3.36, with a standard deviation of 0.47, a standard error of the mean of 0.04 and a 95% confidence interval of [3.26, 3.45]. The mean for parties who have been to the CCMA before is 3.40, with a standard deviation of 0.45, a standard error of the mean of 0.04 and a 95% confidence interval of [3.32, 3.48]. The Mann Whitney U statistic of $0.53 > p > 0.05$ (Figure 5.12 below) supports the null hypothesis that there is no significant difference between these two groups. The graph shows a fair amount of overlap between the two groups.

Table 5.12 Quality of conciliations: first timers and nth timers

Effect	Level of Factor	N	QLTY CON Mean	QLTY CON Std.Dev.	QLTY CON Std.Err	QLTY CON -95.00%	QLTY CON +95.00%
Total		217	3.386764	0.462661	0.031407	3.324860	3.448668
31 CON nth	Y	117	3.407360	0.450689	0.041666	3.324835	3.489885
31 CON nth	N	100	3.362667	0.477432	0.047743	3.267934	3.457400

31 CON nth = FIRST or Nth TIME, where Y and N are as explained above. The number (31) is the question/statement number in the questionnaire



QLTY CON = Quality of conciliation; Y = nth time: the party has been to arbitration in another dispute at the CCMA before. N = first time: the party has never been to arbitration in another dispute at the CCMA before

Figure 5.12 Quality of conciliations: first timers and nth timers

5.5.2 Arbitrations

In terms of the quality of dispute resolution, the means per item in relation to arbitrations, as experienced by all parties, ranged from 3.13 to 3.45, and the standard deviations ranged from 0.52 to 0.79. The median is 3 over all the items. The lower quartile is 3 and the upper quartile is 4. Table 5.12a below tabulates these results.

Table 5.12a Quality of arbitrations: means per item

Variable	Valid N	Mean	Median	Minimum	Maximum	Lower Quartile	Upper Quartile	Std.Dev.
35 QLTY ARB	97	3.423	3.0	2.0	4.0	3.0	4.0	0.556
36 QLTY ARB	97	3.454	3.0	2.0	4.0	3.0	4.0	0.521
37 QLTY ARB	97	3.433	3.0	2.0	4.0	3.0	4.0	0.538
38 QLTY ARB	97	3.392	3.0	2.0	4.0	3.0	4.0	0.569
39 QLTY ARB	97	3.381	3.0	2.0	4.0	3.0	4.0	0.585
40 QLTY ARB	97	3.247	3.0	1.0	4.0	3.0	4.0	0.708
41 QLTY ARB	97	3.196	3.0	1.0	4.0	3.0	4.0	0.606
42 QLTY ARB	97	3.278	3.0	1.0	4.0	3.0	4.0	0.608
43 QLTY ARB	97	3.237	3.0	1.0	4.0	3.0	4.0	0.642
44 QLTY ARB	97	3.258	3.0	2.0	4.0	3.0	4.0	0.582
45 QLTY ARB	96	3.292	3.0	1.0	4.0	3.0	4.0	0.794
46 QLTY ARB	97	3.237	3.0	2.0	4.0	3.0	4.0	0.591
47 QLTY ARB	94	3.266	3.0	1.0	4.0	3.0	4.0	0.625
48 QLTY ARB	95	3.189	3.0	2.0	4.0	3.0	4.0	0.624
49 QLTY ARB	93	3.151	3.0	1.0	4.0	3.0	4.0	0.722
50 QLTY ARB	67	3.134	3.0	1.0	4.0	3.0	4.0	0.625

QLTY ARB = quality of arbitration. The number is the question/statement number in the questionnaire

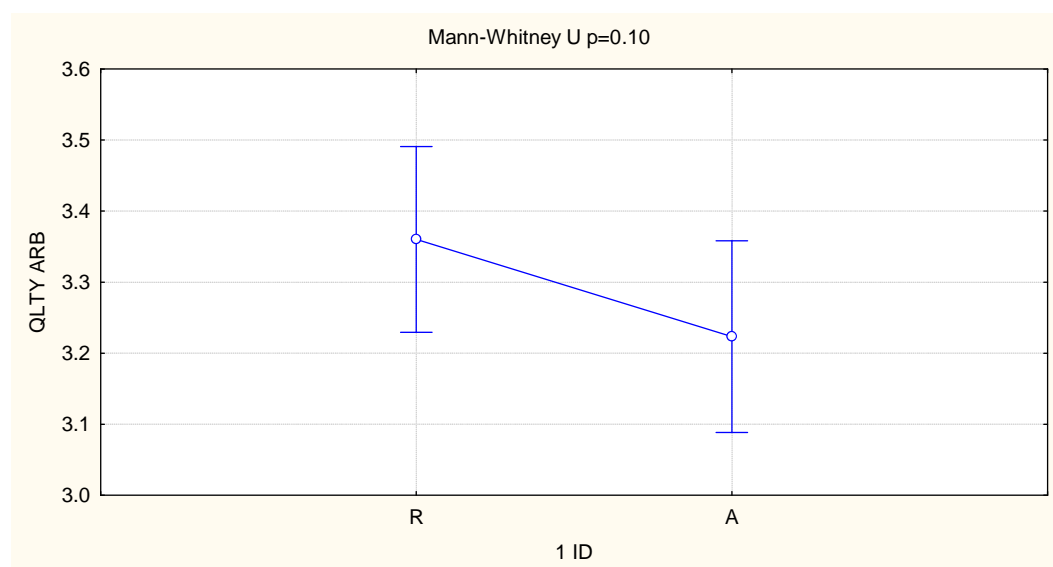
The overall mean for the quality of arbitrations is 3.29, with a standard deviation of 0.46, a standard error of the mean of 0.04 and a 95% confidence interval of [3.19, 3.38].

Table 5.12b Quality of arbitrations: employers and employees

Effect	Level of Factor	N	QLTY ARB Mean	QLTY ARB Std.Dev.	QLTY ARB Std.Err	QLTY ARB -95.00%	QLTY ARB +95.00%
Total		97	3.293857	0.468327	0.047551	3.199469	3.388246
1 ID	R	50	3.360167	0.488713	0.069114	3.221276	3.499057
1 ID	A	47	3.223316	0.439833	0.064156	3.094176	3.352455

ID = identity of party completing the questionnaire (1 = item number in questionnaire); R = employer/employers' organisation party; A = employee/trade union party

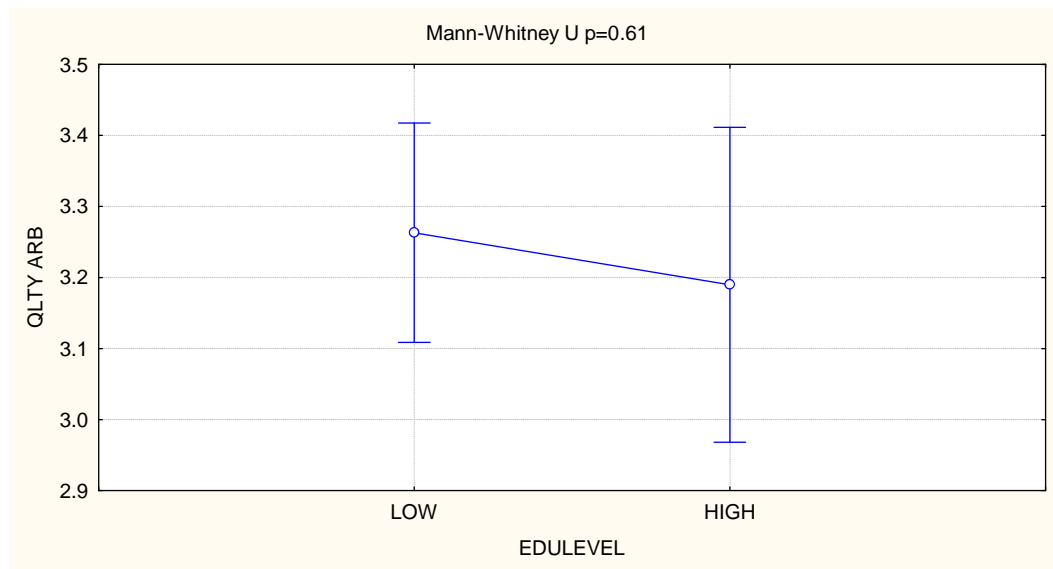
There is no significant difference between employer parties and employee parties in their perceptions of the quality of arbitrations. As shown in Table 5.12b above, the mean for employer parties is 3.36, with a standard deviation of 0.48, a standard error of the mean of 0.06 and a 95% confidence interval of [3.22, 3.49]. The mean for employee parties is 3.22, with a standard deviation of 0.43, a standard error of the mean of 0.06 and a 95% confidence interval of [3.09, 3.35]. As shown in Figure 5.12a below, the Mann Whitney U statistic of $0.10 > p > 0.05$ supports the null hypothesis that there is no significant difference between these two groups in their perceptions of the quality of arbitrations. The graphical comparison also shows some overlap between the two distributions. However, the employee responses are slightly more negative, whereas the responses of the employer parties are slightly more positive.



QLTY ARB = quality of arbitration. ID = identity of party completing the questionnaire (1 = item number in questionnaire): R = employer/employers' organisation party; A = employee/trade union party

Figure 5.12a Quality of arbitrations: employers and employees

Similarly, as shown in Figure 5.13 below there is no significant difference between low- and high-education employee parties in their perceptions of the quality of arbitrations. The Mann Whitney U statistic of $0.61 > p > 0.05$ supports the null hypothesis that there is no significant difference between these two groups. The graphical comparison shows the great amount of overlap between the two distributions.



QLTY ARB = quality of arbitration. EDULEVEL = level of education. LOW = matric and below; HIGH = diploma and above

Figure 5.13 Quality of arbitrations: low- and high-education parties

Also shown in Table 5.13 below is the mean for all employee parties of 3.23, with a standard deviation of 0.43, a standard error of the mean of 0.06 and a 95% confidence interval of [3.11, 3.36]. The mean for low-education parties is 3.26, with a standard deviation of 0.44, a standard error of the mean of 0.07 and a 95% confidence interval of [3.10, 3.42]. The mean for high-education employee parties is 3.18, with a standard deviation of 0.43, a standard error of the mean of 0.10 and a 95% confidence interval of [2.95, 3.42].

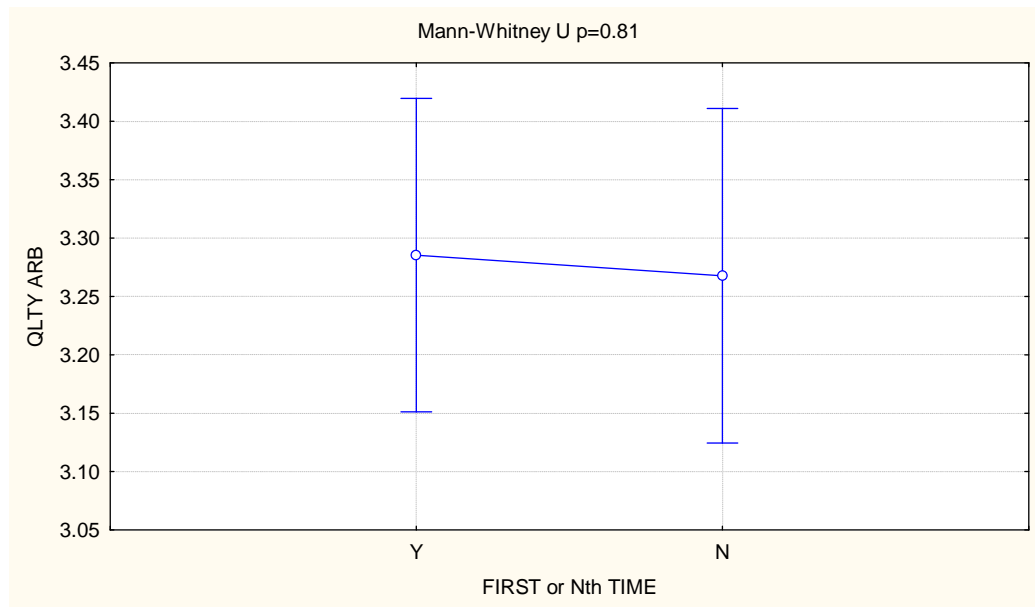
Table 5.13 Quality of arbitrations: low- and high-education parties

Effect	Level of Factor	N	QLTY ARB Mean	QLTY ARB Std.Dev.	QLTY ARB Std.Err	QLTY ARB -95.00%	QLTY ARB +95.00%
Total		49	3.239201	0.437553	0.062508	3.113521	3.364881
EDULEVEL	LOW	33	3.263131	0.442799	0.077081	3.106122	3.420141
EDULEVEL	HIGH	16	3.189844	0.436468	0.109117	2.957266	3.422421

EDULEVEL = Level of education. Low-education = Matric and below; High = Diploma and above

There is also no significant difference in their perceptions of the quality of arbitrations between first timers and parties who have been to the CCMA before. The Mann Whitney U statistic of $0.81 > p > 0.05$ supports the null hypothesis that there is no significant difference between these two

groups in their perceptions of the quality of arbitrations (Figure 5.14 and Table 5.14 below). The graphical comparison shows a great amount of overlap between the two groups. The mean for all parties is 3.27, with a standard deviation of 0.47, a standard error of the mean of 0.04 and a 95% confidence interval of [3.17, 3.37]. The mean for first timers is 3.26, with a standard deviation of 0.43, a standard error of the mean of 0.06 and a 95% confidence interval of [3.13, 3.40]. The mean for parties who have been there before is 3.28, with a standard deviation of 0.50, a standard error of the mean of 0.07 and a 95% confidence interval of [3.14, 3.43].



QLTY ARB = quality of arbitration; Y = nth time: the party has been to arbitration in another dispute at the CCMA before; N = first time: the party has never been to arbitration in another dispute at the CCMA before

Figure 5.14 Quality of arbitrations: first timers and nth timers

	Level of Factor	N	QLTY ARB Mean	QLTY ARB - Std. Dev.	QLTY ARB - Std. Err	QLTY ARB -95.00%	QLTY ARB +95.00%
Total		92	3.277129	0.470508	0.049054	3.179689	3.374568
65 ARB nth	Y	49	3.285374	0.505194	0.072171	3.140266	3.430483
65 ARB nth	N	43	3.267733	0.433360	0.066087	3.134364	3.401101

65 ARB nth = FIRST OR Nth TIME, where Y and N are as explained above. The number (65) is the question/statement number in the questionnaire

5.6 Summary

The purpose of this chapter was to report the results obtained in the study. The chapter presented the results in line with the three performance indicators of efficiency, accessibility and quality of dispute resolution. Except in the case of efficiency, the results were presented firstly as experienced by all the respondents on aggregate, and secondly as experienced by groups.

In the following chapter, the results are interpreted and discussed.

CHAPTER 6: DISCUSSION OF RESEARCH RESULTS

6.1 Introduction

In this chapter, the research results presented in Chapter 5 are interpreted and discussed under each of the three performance indicators: efficiency, accessibility and quality of dispute resolution.

6.2 Efficiency

The efficiency attainments per process are within statutory requirements: during the year under review, the CCMA concluded conciliations in 28 days and arbitrations in 41 days (see Figure 6.1 below). The respondents to the questionnaire also attested that their conciliation or arbitration was concluded in 30 days and arbitrations in 60 days. The national settlement rate for the year was 67%.

The results indicate that the CCMA continues to grow and build on its previous efficiency successes. Although the CCMA underachieved in its efficiency requirements in its infancy, the CCMA has improved its capability to address high volumes of cases within 30 days (conciliations) and 60 days (arbitrations) in the more recent past. The CCMA's settlement rate beats that of the dispute resolution institutions of the previous labour relations regime, namely conciliation boards, industrial councils and the Industrial Court, whose settlement rates revolved around 20% (conciliation boards), 30% (industrial councils) and 17% (Industrial Court). By contrast, the CCMA, which has handled more than 1.3 million cases to date, has stabilised its settlement rate at 67% of its caseload.

The efficiency attainments are particularly laudable considering that the caseload of the CCMA has been on the increase year by year, as shown in Figure 6.2 below.

In summary, the results indicate that the CCMA delivers an expedited/efficient dispute resolution service.

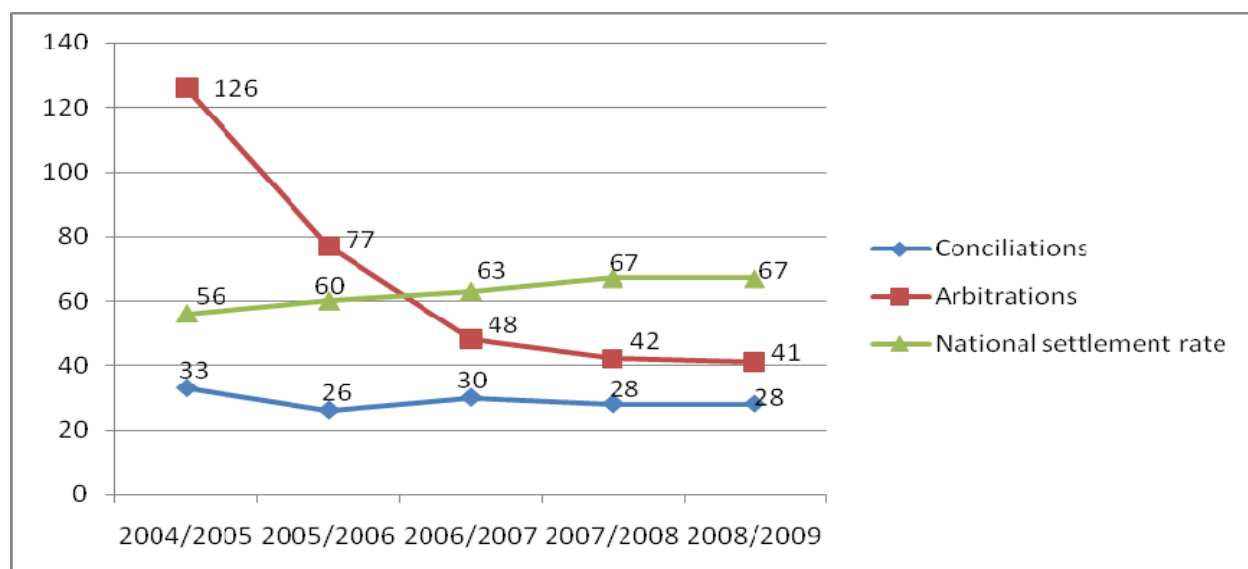


Figure 6.1 Efficiency statistics of the CCMA from 2004/2005 to 2008/2009

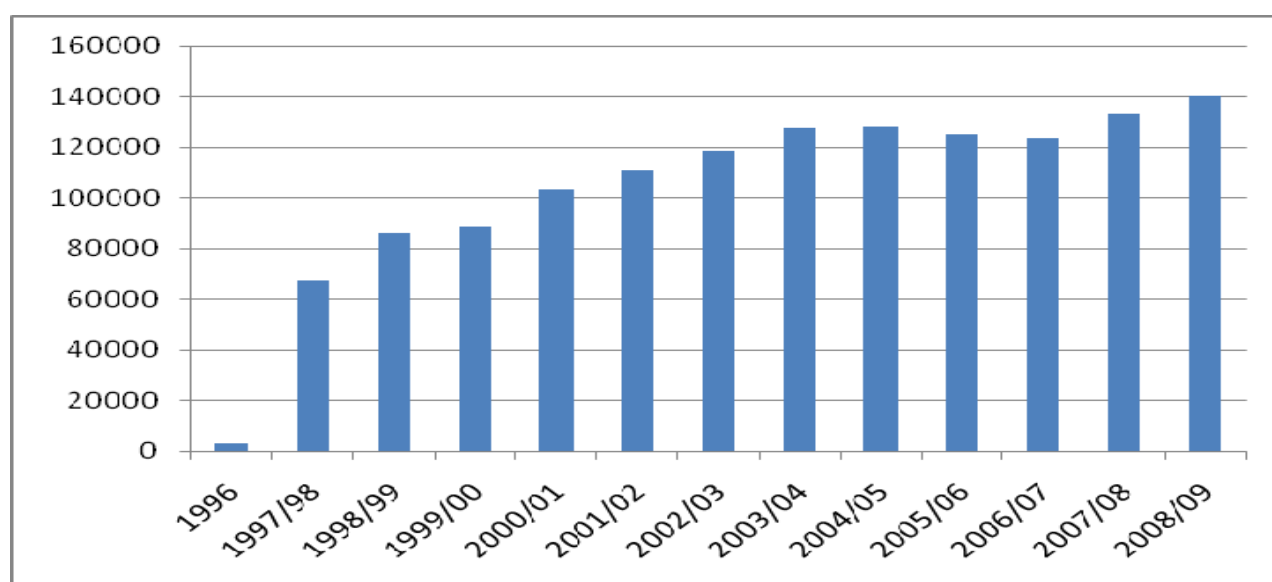


Figure 6.2 CCMA national caseload from 1996 to 2008/2009

6.3 Accessibility

The majority of employee respondents had a matric or lower qualification, earned less than R5000 a month and held below supervisory positions. In the case of employer parties, the majority were small and medium businesses (taken together). Finally, in arbitrations, a majority of the parties (both employer and employee parties in equal proportions) represented themselves,

followed by those who used trade union and employers' organisation representation. Those who used legal representation were in the minority.

These findings are a mark of the ability on the part of parties to effectively participate in the dispute resolution process and, by extension, a mark of the accessibility of the CCMA. In contrast, figures derived from a survey of the Labour Court review judgments indicate that the applicants and respondents had legal representation in 87% and 84% of cases respectively (Ferreira, 2004). The very much higher level of legal representation in the Labour Court emphasises the considerably greater accessibility (informality and absence of costs) associated with the CCMA. It is particularly noteworthy that a very large proportion of the parties who come before the CCMA are small employers and individual employees. For example, the retail industry is the single biggest user of CCMA services, and most referrals from that sector involve small employers with no connections to chain stores or franchise groups. Similarly, notwithstanding the very low levels of unionisation, even domestic workers and agricultural workers make twice as much use of the CCMA as do highly unionised workers such as those in mining.

In terms of the informality of the referral process, the results indicate that while some 10% of employee parties reported that they could not complete the referral form on their own, resorting instead to the help desk for assistance, the results indicate that, in 95% of the instances, the applicant parties found the process of referral to be simple. They did not find the process of referral of a dispute to the CCMA to be complex; they considered the CCMA referral forms as being easy to complete; and they considered knowledge of labour law unnecessary for the purposes of completing the CCMA referral forms or understanding the CCMA's dispute resolution rules/procedures. The perceived informality of the referral process was found in spite of group membership. There was no significant difference between low- and high-education parties or between first timers and nth timers to the CCMA. This is commendable, given the fact that a majority of employee parties at the CCMA were low-salaried, low-education employees who held below supervisory positions.

In terms of the informality of the actual process of dispute resolution (conciliations), the results indicate that 95% of the parties experienced conciliations as informal: they did not find the conciliation to be as technical as court proceedings; they considered knowledge of labour law unnecessary to participate effectively in the conciliation; and the commissioners as well as the parties did not use too much legal language or raise strict rules of procedure. However, there was a significant difference between the employer and employee parties in their perceptions of the informality of conciliations. Compared to the employer parties, the employee parties perceived slight formality in the conciliations. In particular, some 10% of the employee parties reported that they found the conciliation to be technical; that the other party used too much legal language and raised strict rules of procedure; and that the commissioner raised strict rules of procedure but did not use too much legal language. This could be explained in that, by the nature of their duties, the employer parties come into contact with more legalese than the employee parties (particularly low-education employee parties below the supervisory level of employment, who constitute a majority of the CCMA's applicant clientele). Apart from differences between these two categories, there was no significant difference between low- and high-education employee parties or between first timers and nth timers to the CCMA in their perceptions of the informality of conciliations.

The results also indicate that all the parties (regardless of group) found the arbitrations to be informal in that 95% of the parties did not find the arbitration hearings to be as technical as courtroom proceedings. They did not find the arbitrations overloaded with matters of labour law or with complicated procedures; they considered knowledge of labour law unnecessary to participate effectively in the arbitration hearing; and the commissioners as well as the parties neither used too much legal language nor raised strict rules of procedure in arbitrations. This is commendable, considering firstly the demographics of the employee parties, and secondly, the fact that both employers and employees did not request legal representation: a majority either represented themselves or used employers' organisations or trade union representation.

Furthermore, group membership does not affect the users' experiences of the informality of arbitrations. There is no significant difference between the employer and employee parties (although the employee parties tend to perceive slight formality compared to the employer

parties), between low- and high-education parties or between first timers and nth timers in their perceptions of the informality of arbitrations. Given the differences in the perceptions of the informality of conciliations, one would also expect the same situation in terms of arbitrations. However, the results indicate a different situation. This could be explained as a learning effect: that after having gone through conciliation, which they found slightly formal, employee parties become accustomed to the process of dispute resolution and find further processes familiar.

A similar minority of 10% of the employee parties found that the arbitration was technical, however, and found that the other party raised strict rules of procedure. The employers and employees alike, also in a minority of 10%, considered that the commissioner raised strict rules of procedure but did not use too much legal language. The mention of strict rules of procedure could be explained by the commissioners' and employer parties' focus on jurisdictional issues. In the case of conciliations, once the issues in dispute have been determined, the conciliator has to determine whether the CCMA has jurisdiction to conciliate the dispute. If the conciliator neglects to consider jurisdiction and the matter proceeds to arbitration, the arbitrator may dismiss the matter for lack of jurisdiction. Similarly, in arbitrations, once the opening statements have been made, the arbitrator has to consider whether the case presents any jurisdictional issues. If so, the jurisdictional issues should be dealt with before the hearing proceeds. The arbitrator usually hears both parties and makes an oral ruling on jurisdiction on the record.

In summary, the employers and employees both find the actual process of conciliation and arbitration to be informal. For their part, the applicant parties (low- and high-education; first timers and nth timers alike) find the process of referral to be simple.

6.4 Quality of dispute resolution

In terms of the quality of conciliations, the results indicate that the respondents ranked the quality of the conciliations positively. In particular, the results mean that, in 95% of the instances, the commissioners explained the conciliation process, their role and the parties' roles in the conciliation adequately. They adequately explained the possible next steps in the case of non-resolution at conciliation, as well as the employee parties' rights in the case of non-compliance with a settlement agreement by the employer party. They provided the parties with enough

opportunity to explain their case in the conciliation. They did not hurry through the conciliation hearing, as in making no real attempt to conciliate the dispute. They provided the parties with enough opportunity to contribute to shaping the outcome of the conciliation. Finally, the results indicate that the commissioners acted fairly throughout the hearing: they did not appear to be biased towards either party. They determined the nature of the dispute properly and they attempted/helped to resolve disputes sufficiently, whether or not the dispute was resolved (in other words, whether or not the parties reached agreement).

Even though the evaluations of a majority of the respondents are positive, the CCMA received a poor rating by some 10% of the respondents. They reported that the process of conciliation was of a poor quality. In particular, they found that the commissioner denied them enough opportunity to contribute to shaping the outcome of the conciliation; that the commissioner did not act fairly; or that the commissioner hurried through the conciliation hearing with no real attempt to conciliate the dispute.

There were significant differences between employer and employee parties in their positive ratings of the quality of conciliations: the employer parties tended to be more positive, while employee parties tended to be more negative in their evaluations. There was no significant difference between low- and high-education employee parties or between first timers and nth timers to the CCMA in their perceptions of the quality of conciliations.

The results also show that the parties experienced the arbitrations as being of good quality in that in 95% of the instances, the commissioners adequately explained the arbitration process, their and the parties' roles in the arbitration, and the applicants' rights in case of non-compliance with an arbitration award by the responding party. The results also indicate that the commissioners provided the parties with enough opportunity to state their case, to defend their case, to give evidence, to call witnesses, to question the other party and their witnesses, and to submit concluding arguments. The results indicate that the commissioners did not hurry through the hearing with only cursory attention to the details of the dispute or to the parties' interests, rights and needs: they took their time to address the substantial merits of the dispute in the hearing. They acted fairly throughout the arbitration hearing. They did not appear to be biased towards

any party, and they did not refuse to grant a postponement in circumstances where postponement was very appropriate. Compared to conciliation, there were no significant negative reports in respect of arbitration.

Although the employee parties tended to be more negative and the employer parties tended to be more positive, there was no significant difference between the employer parties and the employee parties in their perceptions of the quality of arbitrations. Similarly, there was no significant difference between low- and high-education employee parties or between first timers and nth timers to the CCMA in their perceptions of quality of arbitrations.

In summary, the results indicate that the CCMA is delivering quality dispute resolution: there is a strong focus by the CCMA on the quality of dispute resolution. Despite the annual increases in the caseload, and in spite of the CCMA's attainment of its efficiency targets, the quality of dispute resolution is not compromised. The CCMA has ensured the provision of a just and fair system, as its processes accord each party the right to express their issues and grievances and to know that they have been heard. These findings contradict the literature review, which painted a negative picture of the quality of dispute resolution: that in hot pursuit of efficiency targets, the CCMA becomes unable to ensure the quality of the process of dispute resolution; in other words, the CCMA is unable to balance efficiency and quality of dispute resolution. It might be that the few cases in which the CCMA performs poorly are blown out of proportion.

The absence of significant differences between employers and employees in their evaluations of quality of dispute resolution means that the CCMA has legitimacy in the eyes of both employee and employer parties. This is particularly encouraging, considering that, as a statutory dispute resolution institution, the CCMA may be misconstrued as an unwelcome invasion of management decision-making. For example, in an unfair dismissal dispute, the ex-employee loses nothing in referring the dispute to the CCMA. In actual fact, the ex-employee stands to gain if he or she receives an award of compensation, reinstatement or re-employment. The employer, however, may believe that it stands to lose in the event of such an award. This polarisation in perceptions, if present, would have reflected in negative or at least less positive evaluations of the CCMA by employer compared to employee parties. The fact that there are no such significant

differences speaks volumes about the quality of dispute solution by the CCMA, as well as the legitimacy of the CCMA in the eyes of both employee and employer parties.

Around 80% of disputes are unfair dismissal disputes, and in two-thirds of these cases, the CCMA finds against the employer (Brand, 2000). In some quarters, this trend has been counted against the CCMA, as being evident of its bias towards employees. The absence of such perceptions of bias among employer parties towards the CCMA in the research results discredits such negative allegations. The inclination of employee parties to be more negative and employer parties to be more positive towards the CCMA could be explained as a general disdain of authority or high-power members by low-power members. According to Johnson and Johnson (2009), low-power members tend to react to high-power members through negative evaluations. They tend to express dislike for high-power members, have distorted perceptions that underestimate the positive intent of high-power members toward them, and see high-power members as opponents. In the present case, the employee parties could be projecting their negative evaluations vis-à-vis their employers on the CCMA.

6.5 Summary

This chapter discussed the results presented in Chapter 5. The discussion centred on the three performance indicators: efficiency, accessibility and quality of dispute resolution. The chapter established that the CCMA provides an efficient dispute resolution service: conciliations were concluded within the statutory 30-day limit (specifically in 28 days) and arbitrations within the statutory 60-day limit (specifically in 41 days). The overall settlement rate of the CCMA was 67%. The chapter also established that the respondents considered the process of referral of disputes to the CCMA and the actual process of dispute resolution (conciliations or arbitrations) as being informal. In terms of the quality of dispute resolution, the results indicate that the CCMA provides quality conciliations and arbitrations.

The following chapter concludes with challenges facing and recommendations for the CCMA, a discussion of the limitations of the research, and recommendations for future research.

CHAPTER 7: RECOMMENDATIONS AND CONCLUSIONS

7.1 Introduction

This chapter discusses challenges facing and recommendations for the CCMA, the limitations of the research and recommendations for future research. It ends with the general conclusion of the study.

7.2 Challenges and recommendations

Although the results indicate that the CCMA is delivering an expeditious, efficient, accessible and quality dispute resolution service, the following practical implications arise:

7.2.1 Efficiency

The ever-increasing caseload of the CCMA will keep challenging the CCMA's capacity. The implication is that the CCMA should not rest on its laurels. Instead, it should keep improving the turnaround time for both conciliations and arbitrations to remain equal to the torrents of referrals. In the event of complacency, the increasing caseload will sooner or later overwhelm the capacity of the CCMA and inefficiencies may creep in.

In calculating the turnaround times, the CCMA excludes the period from the date of referral of a case for conciliation or the period from the date of request for arbitration to the date of activation of the referral/request in their database. The time between referral/request date and activation date reflects the time needed for administrative work to complete the collection of information. The 30-or 60-day period to resolve the dispute only commences after a case has been activated (Benjamin & Gruen, 2006). However, the Labour Relations Act, 1995 (RSA, 1995b) (Section 135) stipulates that, when a dispute has been referred to the CCMA, the CCMA must attempt to resolve it through conciliation within 30 days of *the date the CCMA received the referral* (emphasis added). According to Benjamin and Gruen (2006), allowing for regional variations, the national average of the period between date of referral and activation date ranges from six to ten days. When these days are added to the period from activation to end date, the sum exceeds the 30-day limit for conciliations and the turnaround for arbitrations reaches 50 days. It is recommended that the CCMA should include the period between date of referral/request and

activation date in its efficiency calculations and still meet its efficiency requirements. The inclusion will mean increased expedition.

In calculating the settlement rate, the CCMA includes cases that are withdrawn, rejected for lack of jurisdiction or settled by the parties themselves, in addition to settlements orchestrated by the CCMA (Benjamin & Gruen, 2006). When the cases that are withdrawn, rejected for lack of jurisdiction or settled by the parties themselves are excluded, the settlement rate shrinks to about 50% (Benjamin, 2009). The practical implication is that the national settlement rate as currently proclaimed by the CCMA is a contaminated measure of the CCMA's performance, given the fact that the measure does not confine itself to the percentage of cases in which a conciliator brings about consensus between the parties in the conciliation itself. It is recommended that the calculation of the settlement rate be redefined from the current method to one that excludes the cases that are withdrawn, rejected for lack of jurisdiction or settled by the parties themselves. In this way the settlement rate will truly reflect the performance of the CCMA.

7.2.2 Accessibility

Although the respondents found the referral process, conciliations and arbitrations to be informal, the employee parties tended to perceive more formality in the referral process and in the conciliations and arbitrations than did the employer parties.

It is recommended that the CCMA conduct a rigorous diagnostic survey to determine the technical points in its processes and to see how best the institution can simplify its processes further. In relation to the employee parties reporting that they considered the employer party as using too much legal language, it could be that employers engage lawyers (who masquerade as employers' organisation representatives) to represent them, thereby introducing technicalities into the CCMA. It is recommended that the CCMA should put in place stringent identification measures to scrutinise employers' representatives to ensure parity of representation and, by extension, the informality of processes. In any case, it is recommended that the CCMA should require commissioners to intervene on behalf of the employee party when an employer party becomes legalistic and technical in their submissions.

The researcher recognises that the CCMA conducts outreach visits to outlying areas of South Africa, produces free explanatory leaflets that it distributes to potential users, and conducts best practice workshops for (prospective) users (employers, employees and trade union representatives) about dispute resolution at the CCMA. The CCMA should intensify such education (for instance through the media, viz. radio stations, television stations or the print media) to increase public awareness of the CCMA. Such education familiarises users with the referral process and the actual conciliations and arbitrations. It also is noteworthy that the CCMA provides client service and interpretation services to employee parties as and when needed. These services certainly increase the accessibility and/or informality of the processes of the CCMA.

7.2.3 Quality of dispute resolution

The results indicate that the CCMA is delivering quality dispute resolution. In 95% of the instances, the ratings for the quality of dispute resolution were positive. However, as indicated earlier, some 10% of the respondents reported poor quality of the process of dispute resolution. It is recommended that the CCMA should aggressively pursue a policy of total quality-of-dispute-resolution to completely eliminate such residual discontent. The CCMA could put in place a performance management system centred on, among other things, key result areas that are expected of commissioners in respect of quality of dispute resolution, that is, what the commissioners must achieve to promote the quality of dispute resolution. Such a performance-related compensation structure could motivate the commissioners to promote the quality of dispute resolution at all times and at all costs.

Research on burnout can also be applied to the CCMA. Cordes and Dougherty (1993) state that client interactions contribute to burnout in service provision. Client interactions that are more direct, frequent or of longer duration, or client problems that are chronic (versus acute) are associated with higher levels of burnout. The problem or strain is often aggravated by an excessively heavy client load, both quantitative and qualitative (Cordes & Dougherty, 1993). The quantitative dimensions include frequency of contact, duration of contact, number of interactions and percentage of time spent with clients. As the number of clients increases, the demands on the employee's personal resources increase. If these demands are continuous rather than intermittent, the employee may be vulnerable to burnout. The qualitative dimensions of client caseload

involve interpersonal distance (for example phone contact versus face-to-face contact), client characteristics (for example chronic versus acute, child versus teenager), and the type of client problem at issue (Cordes & Dougherty, 1993).

Although burnout has been studied mainly in the helping professions, it may provide insight into the quality of dispute resolution at the CCMA. The commissioners' work entails high levels of arousal from direct, frequent and rather intense interactions with disputants. The commissioners are constantly dealing with other people and their disputes. Their work involves extensive and direct face-to-face contact with people in emotionally charged situations. The clients may be aggressive, passive, dependent or defensive. Feedback from either the client or the organisation is almost exclusively negative, for example, successful rescissions or reviews of their decisions or negative media publicity. Such job characteristics can result in burnout (characterised by emotional exhaustion, depersonalisation, and diminished personal accomplishment), which in turn result in poor quality of dispute resolution. It is therefore recommended that the CCMA strive to maintain an organisational climate conducive to the optimal wellbeing of its commissioners to avoid incidences of burnout and, therefore, of poor service delivery. For example, an increased commissioner head count or an increased number of CCMA offices in the country could lessen the individual commissioners' workload and or reduce intensity of client interactions.

As recommended under accessibility, it is further recommended that the CCMA should launch an ongoing client satisfaction survey to keep itself informed of its users' satisfaction with its performance in general and the quality of its dispute resolution in particular.

7.3 Limitations of the research and recommendations for future research

In discussing limitations of this research, the measuring instrument that was used is the first point of reflection (Van Rooyen, 2007). Although the questionnaire was developed in a systematic manner, sophisticated test construction and evaluation did not take place. More sophisticated statistical techniques, such as structural equation modelling (for example LISREL), could have been performed on the data to test the construct validity of the instrument. This shortcoming is reflected in the low inter-item correlations for the informality of the referral process, which may

mean poor operationalisation of the construct or poor format of the statements, resulting in some degree of response bias. For example, for the statements “knowledge of labour law is necessary (say) to be able to complete referral forms”, the parties were quick to tick “agree” or “strongly agree” (meaning the referral process was not simple). Their understanding, however, was that while they found the process of referral informal and user friendly, they believed that knowledge of labour law was an added advantage. The implication is that negative responses (which mean simplicity) were effectively shut out.

Other limitations that reduce the generalisability of the research findings are that the study was unable to reach other provincial offices of the CCMA. Future research is well advised to collect data from users at different offices. A comparison of employer and employee parties to the same dispute resolution process or hearing was also not done. The questionnaires were not paired to establish the perceptions of the parties to the same dispute resolution process. Such a test could add more sophisticated rigour to the research results. Neither did the study compare results in terms of the different demographic variables of the participants, for example language or race. With the wisdom of hindsight, it would also have been appropriate to establish whether there were any significant differences between these categories. In the same vein, the respondents completed the questionnaires immediately after closure of the hearing. In the case of arbitrations, this was before the arbitration award, which would only come out within the 14 days following the conclusion of the arbitration proceedings. Future research would be well advised to collect data from parties who have received their arbitration awards. There is a high probability that the users’ satisfaction with the outcomes overrides their satisfaction with the process of dispute resolution. Where the parties receive favourable awards, therefore, they may evaluate the CCMA positively, despite initial dissatisfaction with and negative evaluation of the process of dispute resolution. Where the parties obtain unfavourable awards, they may evaluate the CCMA negatively, despite initial satisfaction with the process of dispute resolution and their associated positive evaluation of the CCMA. This may explain the negative publicity that overhangs the CCMA, despite the positive results of the research.

The other limitation is that the questionnaire was in English only. Parties who did not speak or understand English were unable to participate in the research. They would have required the

services of an interpreter, which the researcher had not reckoned with. Finally, future studies should endeavour to increase the sample size. Although the sample size of 218 in the present study is reasonably good, the sample size “shrinks” when group comparisons are made. For example, half this sample was employee parties, the other half employer parties.

7.4 Conclusion

The CCMA exists to provide an efficient, accessible and quality dispute resolution service. The objective of this study was to evaluate whether the CCMA is attaining these performance measures.

According to the literature review presented in Chapter 3, the early years of the CCMA, from 1996 to 2004, were characterised by severe underachievement in terms of efficiency. Improvements started trickling in from about 2004, and then became significant thereafter. The literature review covered the period from 1996 to 2007/2008. The current study focussed on the efficiency statistics of the CCMA for the 2008/2009 year, and found that the CCMA continues to grow and build on its previous efficiency successes of providing expeditious/efficient dispute resolution within the statutory time limits of 30 days (conciliations) and 60 days (arbitrations). According to the literature review, the high patronage of the CCMA by low-salaried, low-education and low-rank employees who represent themselves in hearings signifies the accessibility of the CCMA. The research results provided empirical evidence that supports the findings of the literature review, which indicated that the CCMA was accessible. In terms of the quality of dispute resolution, the literature review indicated failure on the part of the CCMA to balance expedition or efficiency and quality of dispute resolution. The research results indicate that the CCMA provides professional and quality dispute resolution.

In conclusion, the results indicate that the CCMA is providing expeditious, efficient, accessible, informal and professional quality dispute resolution. There is little doubt that the CCMA has made a major contribution to social justice in the workplace. It is believed that this study has made a valuable contribution in the sphere of labour dispute resolution for both the CCMA and all the actors in labour relations, both in terms of the research results and the ensuing recommendations.

REFERENCES

- Babbie, E & Mouton, J. (2001). *The practice of Social Research: South African Edition*. Cape Town: Oxford University Press.
- Basson, A., Christianson, M. & Garbers, C. (2005). *Essential Labour Law*. Centurion: Labour Law Publications.
- Bendix, S. (2004). *Industrial Relations in South Africa*. 4th ed. (revised). Cape Town: Juta.
- Benjamin, P. (2007). Friend or Foe: The Impact of Judicial Decisions on the Operation of the CCMA. *Industrial Law Journal*, 28, 1-42.
- Benjamin, P. (2009). Conciliation, Arbitration and enforcement: The CCMA's Achievements and Challenges. *Industrial Law Journal*, 30, 26-48.
- Benjamin, P. & Gruen, C. (2006). The Regulatory Efficiency of the CCMA: A Statistical Analysis of the CCMA's CMS Database. Development Policy Research Unit: University of Cape Town.
- Bhorat, H., Pauw, K. & Mncube, L. (2007). Understanding the Efficiency and Effectiveness of the Dispute Resolution System in South Africa: An Analysis of CCMA Data. Development Policy Research Unit: University of Cape Town.
- Bosch, D., Molahlehi, E. & Everett, W. (2004). *The Conciliation and Arbitration Handbook: A Comprehensive Guide to Labour Dispute Resolution Procedures*. Durban: LexisNexis Butterworths.
- Brand, J. (2000). CCMA: Achievements and Challenges – Lessons from the first three years. *Industrial Law Journal*, 21, 77-97.
- Brand, J., Lotter, C., Steadman, F. and Ngcukaitobi T. (2008). *Labour dispute resolution*. 2nd ed. Cape Town: Juta.

- Budd, J. & Colvin, A. (2008). Improved Metrics for Workplace Dispute Resolution Procedures: Efficiency, Equity, and Voice. *Industrial Relations*, 47(3), 460-479.
- Cameron, E., Cheadle, H. & Thompson, C. (1989). *The new Labour Relations Act: the law after the 1988 amendments*. Cape Town: Juta.
- CCMA. (2005). 2004/2005 Annual Report. Report Number 54/2005. CCMA Publications. Johannesburg.
- CCMA. (2006). Annual Report 2005/2006. Report Number 106/2006. CCMA Publications. Johannesburg.
- CCMA. (2007). Annual Report 2006/2007. Report Number 93/2007. CCMA Publications. Johannesburg.
- CCMA. (2008). Annual Report 2007/2008. Report Number 55/2008. CCMA Publications. Johannesburg.
- CCMA. (2009). Annual Report 2008/2009. Report Number 33/2009. CCMA Publications. Johannesburg.
- Christie, S. (1998). One-stop shopping: has the CCMA made dispute resolution any easier? *Track Two: Constructive Approaches to Community and Political Conflict*, 7(2).
- Cordes, C.L., and Dougherty, T.W. (1993). A review and an integration of research on job burnout. *Academy of Management Review*, 18(4), 621-656.
- Craig, P.P. (2008). *Administrative Law*. 6th ed. London: Sweet and Maxwell.
- Dauer, E.A. (1994). *Manual of Dispute Resolution: ADR Law and Practice*. Colorado Springs: McGraw Hill Inc.
- Du Plessis, J.V. (1994). *A practical guide to labour law*. Pretoria: Digma.
- Du Toit, D. (2006). *Labour relations law: A comprehensive guide*. Durban: LexisNexis Butterworths.

- Faris, J. (2006) Deciphering the language of mediatory intervention in South Africa. *Comparative and International Law Journal of Southern Africa*, 39(30), 427-449.
- Ferreira, G. (2004). The Commission for Conciliation, Mediation and Arbitration: its effectiveness in dispute resolution in labour relations. *Politeia*, 23(2), 73-85.
- Field, A. (2009). Discovering statistics using SPSS: (and sex and drugs and rock 'n' roll). 3rd ed. Los Angeles: SAGE.
- Finnemore, M. & Van Rensburg R. eds. (2002). *Contemporary Labour Relations*. 2nd ed. Durban: LexisNexis Butterworths.
- Genn, H., Lever, B., Gray, L. & Balmer, N. (2006). Tribunals for diverse users. Research report. DCA Research Series. Vol. 1. London: Department for Constitutional Affairs.
- Goldberg, S.B., Rogers, N.H. & Cole, S.R. (2007). *Dispute Resolution: Negotiation, Mediation, and Other Processes*, 5th ed. New York: Aspen Publishers.
- Hay, J.R., Shleifer, A. & Vishny, R.W. (1996). Toward a theory of legal reform. *European Economic Review*, 40(3-5), 559-567.
- Hoexter, C. (2008). Clearing the intersection? Administrative law and labour law in the Constitutional Court. *Constitutional Court Review*, 1, 209-234
- Hutchinson, W. (2007). Enforcing arbitration awards: employee remedies. In *Contemporary Labour Law*, 178(2), 14-17.
- Hutchinson, W. (2009). Grounds for review. *Contemporary Labour Law*, 18(8), 79-80.
- Johnson, D.W. & Johnson, F.P. (2009) *Joining Together: Group Theory and Group Skills*. 10th ed. Upper Saddle River, New Jersey, USA: Pearson Education.
- Kerlinger, F.N. & Lee, H.B. (2000). *Foundations of Behavioural Research*. Fort Worth: Harcourt College Publishers.

- King, S. (1996). Dispute resolution in South Africa. In Christie, S. and Madhuku, L. *Labour dispute resolution in Southern Africa: country reports*. Institute of Development and Labour Law: University of Cape Town.
- Le Roux, P. (2002). Challenging and Enforcing CCMA Arbitration Awards: The New LRA Procedures to Ensure Compliance. *Contemporary Labour Law*, 11(2), 111-114.
- Le Roux, P. (2007). Applications to the CCMA for rescission of arbitration awards: 'good cause' and the Labour Relations Act. *Contemporary Labour Law*, 16(2), 121-123.
- Leeds, C. & Wöcke, A. (2009). Methods of reducing the referral of frivolous cases to the CCMA. *South African Journal of Labour Relations*. 33(1), 28-44.
- Levy, A & Venter, T. (2006). Research findings: CCMA, bargaining councils and private cases. *Tokiso Review 2006/7*. Johannesburg: Tokiso Dispute Settlement, 5-42.
- Lewicki, R.J., Barry, B. & Saunders, D.M. (2007). *Negotiation*. Boston: McGraw-Hill/Irwin.
- Meyer, J.P. (1997). The Pros and Cons of Mediation. *Dispute Resolution Journal*, 52(3), 8-14.
- Owen, J. (2007). *Program Evaluation: Forms and Approaches*. 3rd ed. New York: Guilford Press.
- Partington, J. & Van der Walt, A. (2008). Re(viewing) the Constitutional Court's decision in Sidumo. *Obiter*, 29(2), 209-237.
- Roberts, S.A. & Palmer, M. (2005). *Dispute Processes: ADR and the Primary Forms of Decision Making*. Cambridge, UK: Cambridge University Press.
- Republic of South Africa (RSA) (1956). Labour Relations Act (Act No. 28 of 1956). Pretoria: Government Printer.
- Republic of South Africa (RSA) (1995a). Explanatory Memorandum to the Labour Relations Bill (Bill No. 66 of 1995). Pretoria: Government Printer.

- Republic of South Africa (RSA) (1995b). Labour Relations Act (Act No. 66 of 1995). Pretoria: Government Printer.
- Republic of South Africa (RSA) (1996). National Small Business Act (Act No. 102 of 1996). Pretoria: Government Printer.
- Republic of South Africa (RSA) (1997). Basic Conditions of Employment Act (Act No. 75 of 1997). Pretoria: Government Printer.
- Republic of South Africa (RSA) (1998a). Employment Equity Act (Act No. 55 of 1998). Pretoria: Government Printer.
- Republic of South Africa (RSA) (1998b). Skills Development Act. (Act No. 97 of 1998). Pretoria: Government Printer.
- Rycroft, A. & Jordaan, B. (1992). *A Guide to South African Labour Law*. 2nd ed. Cape Town: Juta.
- Sidumo v Rustenburg Platinum Ltd. 2007. 12 BLLR 1097 (CC)
- Sprigg, C.A. & Jackson, P.R. (2006). Call Centers as Lean Service Environments: Job-Related Strain and the Mediating Role of Work Design. *Journal of Occupational Health Psychology*, 11(2), 197–212.
- StatSoft Inc., (2009). STATISTICA (Data analysis software system), www.statsoft.com.
- Theron J. (2005). Intermediary or Employer? Labour Brokers and the Triangular Employment Relationship. *Industrial Law Journal*, 26, 618-649.
- Ury, W.L., Brett, J.M. & Goldberg, S.B. (1988). *Three approaches to resolving disputes: interests, rights and power*. In Lewicki, R.J., Barry, B. & Saunder, D.M. (eds). (2007). *Negotiation: readings, exercises and cases*. 5th ed. Boston: McGraw-Hill/Irwin.
- Van Kerken, E. (2000). Some jurisdictional issues concerning the arbitration of labour disputes by the CCMA. *Industrial Law Journal*, 21, 39-52.

Van Rooyen, K. (2007). The role of performance management in the enhancement of desired employee outcomes. Unpublished Masters thesis. University of Stellenbosch, South Africa.

Venter, R. (2007). *Labour relations in South Africa*. Oxford University Press: Cape Town.

Yarn, D. (1999). *The dictionary of conflict resolution*. San Francisco: Jossey-Bass.

APPENDIX A: QUESTIONNAIRE

AN EVALUATION OF THE DISPUTE RESOLUTION FUNCTION OF THE CCMA

You are asked to participate in this research conducted by Kwakwala, B.O.K. currently enrolled for a master's degree in human resources management in the Department of Industrial Psychology at the University of Stellenbosch. The results of this study will contribute to his thesis/dissertation which will be submitted in partial fulfilment of the requirements for the attainment of the master's degree. You have been selected as a possible participant in this study in your capacity as an employee/trade union or employer/employers' organisation party to a dispute resolution hearing at the CCMA.

1. PURPOSE OF THE STUDY

The purpose of the research is to evaluate the CCMA in terms of efficiency, accessibility and quality of dispute resolution.

2. **PROCEDURES:** *If you volunteer to participate in this study, we would ask you to answer the questions/statements on the questionnaire in all honesty and to the best of your knowledge.*

3. **POTENTIAL RISKS AND DISCOMFORTS:** *Participation in this study does not predispose anyone to any risk, discomfort or inconvenience except for the time that it takes to complete the questionnaire.*

4. **POTENTIAL BENEFITS TO SUBJECTS AND/OR TO SOCIETY:** *The potential benefit of this study is to improve the operation of the CCMA.*

5. **PAYMENT FOR PARTICIPATION:** *There is no payment for participation in this study.*

6. **CONFIDENTIALITY:** *Any information that is obtained in connection with this study and that can be identified with you will remain confidential, will be used solely and only for purposes of knowledge generation and will be disclosed only with your permission or as required by law. As a matter of confidentiality, you will not be asked to indicate your personal, organization or similar identification details; data will be stored under maximum computer security, the questionnaires will also be secured in the Department of Industrial Psychology; and data analysis will be computerized. Both the data and the questionnaires will be accessible only to lecturers in the Department of Industrial Psychology because of their academic connection with the research. The findings may be published in appropriate journals which will not mention or allude to your identity.*

7. **PARTICIPATION AND WITHDRAWAL:** *You can choose whether to be in this study or not. If you volunteer to be in this study, you may withdraw at any time without consequences of any kind. You may also refuse to answer any questions you don't want to answer and still remain in the study. The investigator may withdraw you from this research if circumstances arise which warrant doing so.*

8. IDENTIFICATION OF INVESTIGATORS

If you have any questions or concerns about the research, please feel free to contact:

Blazius Oscar Kwakwala, Principal Investigator on 071 418 0064 or email 15427919@sun.ac.za;

Mr. GG Cillie, Supervisor and Senior Lecturer, Department of Industrial Psychology, on 021 808 3595 or e-mail: gqc@sun.ac.za

9. RIGHTS OF RESEARCH SUBJECTS

You may withdraw your consent at any time and discontinue participation without penalty. You are not waiving any legal claims, rights or remedies because of your participation in this research study. If you have questions regarding your rights as a research subject, contact the Malene Fouche, Research Coordinator, Unit for research and Development, University of Stellenbosch, on 021 808 4622 or e-mail: mfouche@sun.ac.za.

Please tick below if you have read and understood the information provided above and agrees to take part in the study under conditions stated above.

I agree to participate

☐

SECTION 1: GENERAL DETAILS (BOTH PARTIES)

Please tick (✓) the cell that best describes your details.

1. Identity of party completing the questionnaire:

<i>Employee party (includes trade union party)</i>	<i>Employer party (includes employers' organisation party)</i>
--	--
2. Nature of dispute. (Choose one or more as appropriate)

Unfair dismissal	Unfair labour practice	Mutual interest	Severance pay	Collective bargaining	Other (specify)
------------------	------------------------	-----------------	---------------	-----------------------	-----------------
3. What is/was your position in the workplace? (Choose one)

Managerial position	Supervisory position	Below supervisory position
---------------------	----------------------	----------------------------
4. Sector in which the workplace falls: (Choose one)

Retail	Private security	Domestic	Business and professional services	Agricultural and farming	Food and beverage	Building and construction	Other (specify)
--------	------------------	----------	------------------------------------	--------------------------	-------------------	---------------------------	-----------------

SECTION 2: EMPLOYEE/TRADE UNION PARTIES ONLY.**GENERAL**

Please tick (✓) the cell that best describes your educational and earnings situation.

5. My highest qualification is:

Below matric	Matric	Diploma	Degree	Second degree (and above)
--------------	--------	---------	--------	---------------------------
6. My total wages per month are:

Up to R2500	Between R2501-R5000	Between R5001-R7500	Between R7501-R10000	Over R10001
-------------	---------------------	---------------------	----------------------	-------------

THE REFERRAL PROCESS

Please tick (✓) the cell that best describes your experience of the process of referral of a dispute to the CCMA.

Statement	Strongly Disagree	Disagree	Agree	Strongly agree
<i>EXAMPLE. Today is Sunday.</i>	✓			
7. The process of referral of a dispute to the CCMA is complex.				
8. The CCMA referral forms are easy to complete.				
9. Knowledge of labour law is necessary to be able to complete CCMA referral forms.				
10. Knowledge of labour law is necessary to understand the CCMA's dispute resolution rules/procedures.				
11. I requested the Help Desk to help me complete the CCMA referral forms.				

SECTION 3 (BOTH PARTIES): THE PROCESS OF DISPUTE RESOLUTION

12. What is the process of dispute resolution that has been applied in your dispute? (Choose one. If you have already been through conciliation and you have now come for arbitration, tick arbitration only.)

Conciliation	Con-Arb	Arbitration
--------------	---------	-------------

SECTION 4 (BOTH PARTIES): CONCILIATION (INCLUDES CONCILIATION UNDER CON-ARB)

Please tick (✓) the cell that best describes your experience during conciliation at the CCMA.

Statement	Strongly Disagree	Disagree	Agree	Strongly agree
13. The Commissioner adequately explained the conciliation process.				
14. The Commissioner adequately explained his/her role in the conciliation.				
15. The Commissioner adequately explained the parties' role in the conciliation.				
16. The Commissioner provided me enough opportunity to explain my case in the conciliation.				
17. The Commissioner hurried through the conciliation hearing with no real attempt to conciliate the dispute.				
18. The Commissioner provided me enough opportunity to contribute in shaping the outcome of the conciliation.				
19. The Commissioner properly determined the nature of the dispute.				
20. The Commissioner acted fairly throughout the conciliation hearing.				
21. The Commissioner appeared to be biased towards the other party.				
22. The Commissioner adequately explained possible next steps in case of non resolution at conciliation.				
23. (<i>Employee party only</i>) The Commissioner adequately explained my rights in case of non compliance, by the employer party, with a settlement agreement.				
24. (<i>Regardless of whether or not the dispute was resolved at conciliation</i>) The Commissioner sufficiently attempted/helped to resolve the dispute.				
25. The conciliation hearing was so formal I felt like I was in court.				
26. Knowledge of labour law is necessary to participate effectively in the conciliation.				
27. The Commissioner used too much legal language in the conciliation.				
28. The other party used too much legal language in the conciliation.				
29. The other party raised strict rules of procedure in the conciliation.				
30. The Commissioner strictly applied or permitted strict rules of procedure in the conciliation.				

31. Have you been a party to conciliation at the CCMA in another dispute before? Yes ☐ No ☐

32. How many hearings has the conciliation taken before closure?

1 hearing	2 hearings	3 hearings	4 hearings	More than 4 hearings
-----------	------------	------------	------------	----------------------

33. Was the conciliation finalised within 30 days from the date of referral? Yes ☐ No ☐

34. If No, was the time extended with your agreement?

Yes ☐ No ☐

SECTION 5 (BOTH PARTIES): ARBITRATION (INCLUDES ARBITRATION UNDER CON-ARB)

Please tick (✓) the cell that best describes your experience during arbitration at the CCMA. Please answer this Section only if the process of dispute resolution that has been applied in the dispute is arbitration. If it is conciliation only, skip this section and go to the next section, Section 6.

Statement	Strongly Disagree	Disagree	Agree	Strongly agree
35. The Commissioner adequately explained the arbitration process.				
36. The Commissioner adequately explained his/her role in the arbitration.				
37. The Commissioner adequately explained the parties' role in the arbitration.				
38. The Commissioner provided me enough opportunity to state my case in the arbitration.				
39. The Commissioner provided me enough opportunity to defend my case in the arbitration.				
40. The Commissioner hurried through the hearing without adequate attention to details of the dispute or to our interests, rights and needs.				
41. The Commissioner addressed the substantial merits of the dispute in the hearing.				
42. The Commissioner acted fairly throughout the arbitration hearing.				
43. The Commissioner provided me enough opportunity to question the other party in the hearing.				
44. The Commissioner provided me enough opportunity to question the other party's witnesses in the hearing.				
45. The Commissioner appeared to be biased towards the other party.				
46. The Commissioner provided me enough opportunity to give evidence.				
47. The Commissioner provided me enough opportunity to call witnesses.				
48. The Commissioner provided me enough opportunity to submit concluding arguments.				
49. The Commissioner refused to grant a postponement in circumstances where postponement was very appropriate.				
50. (<i>Employee party only</i>) The Commissioner adequately explained my rights in case of non compliance, by the employer party, with an arbitration award.				
51. The hearing was overloaded with matters of labour law.				
52. The hearing was overloaded with complicated procedures.				
53. The arbitration hearing was so formal I felt like I was in court.				
54. Knowledge of labour law is necessary to participate effectively in the arbitration hearing.				
55. The Commissioner used too much legal language in the arbitration.				
56. The other party used too much legal language in the arbitration.				
57. The other party raised strict rules of procedure in the arbitration.				
58. The Commissioner strictly applied or permitted strict rules of procedure in the arbitration.				

59. How many hearings has the arbitration taken before closure?

☐ 1 hearing
 ☐ 2 hearings
 ☐ 3 hearings
 ☐ 4 hearings
 ☐ More than 4 hearings

60. Has the arbitration been finished within 60 days from the date of request for arbitration? Yes ☐ No ☐

61. If No, was the time extended with your agreement? Yes ☐ No ☐

62. Did you request legal representation in the arbitration hearing? Yes ☐ No ☐

63. If Yes, was the request granted? Yes ☐ No ☐

64. What type of representation did you use in the arbitration hearing? (Choose one)

<i>Appeared in person</i>	<i>Trade union representation</i>	<i>Legal representation</i>	<i>Employers' organisation</i>
---------------------------	-----------------------------------	-----------------------------	--------------------------------

65. Have you been a party to arbitration at the CCMA in another dispute before? Yes ☐ No ☐

SECTION 6 (BOTH PARTIES): BEST PRACTICE WORKSHOPS

"The CCMA offers a variety of trainings including Best Practice Workshops (like Building Workplace Relationships and Managing Conflict in the Workplace) for its users."

66. Have you ever attended any of these workshops? Yes ☐ No ☐ (If Yes to Question 66, go to Questions 67 – 68).

Statement	Strongly Disagree	Disagree	Agree	Strongly agree
67. These workshops have helped us manage labour relations better in the workplace.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
68. These workshops have helped us participate effectively in the hearing.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

SECTION 7: EMPLOYER/EMPLOYERS' ORGANISATION PARTIES ONLY

Please tick (✓) the cell that best describes your business situation.

69. We are a: (Choose one)

Micro business/ domestic employer (1-9 employees)	Very small business (10 – 19 employees)	Small business (20 – 49 employees)	Medium business (50 – 100 employees)	Big business (more than 100 employees)
---	--	---------------------------------------	---	---

Statement	Strongly Disagree	Disagree	Agree	Strongly agree
70. The resources spent attending to the dispute resolution proceedings at the CCMA have adversely impacted business operations.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

END OF QUESTIONNAIRE

Thank you for your participation in this survey. We value your input.